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I. COURT APPROVES ADMISSION OF "VICTIM IMPACT" EVIDENCE

*Lucas v. Evatt*¹ addresses the admissibility of victim impact evidence presented in a prosecutor's closing argument in a capital sentencing proceeding. This issue is closely related to the defendant's rights under the Eighth Amendment of the United States Constitution.² In *Lucas* the South Carolina Supreme Court held that the solicitor's references to the victims and to the impact of their murders on their family, made during closing argument, did not render the trial fundamentally unfair.³ Until recently, decisions by the United States Supreme Court in *Booth v. Maryland*⁴ and *South Carolina v. Gathers*⁵ prohibited a prosecutor from referring to victim impact evidence.⁶ However, the Supreme Court overruled *Booth* and *Gathers* in *Payne v. Tennessee*,⁷ and the *Lucas* decision is consistent with *Payne*.⁸ As will be seen, *Payne* and *Lucas* create new litigation options for prosecutors and possibly for defense attorneys as well.

D. Cecil Lucas was charged with the murders of Bill and Evelyn Rayfield.⁹ Lucas was convicted as charged on July 25, 1983.¹⁰ At the capital sentencing jury proceeding, the solicitor's closing argument included victim impact evidence.¹¹ Victim impact evidence includes references to the victim and the impact of the murder upon members of the victim's family.¹² Lucas received a death sentence for the two murders which the South Carolina Supreme Court affirmed.¹³ Lucas then subsequently petitioned for post-

1. 308 S.C. 31, 416 S.E.2d 646 (1992).

2. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3. *Lucas*, 308 S.C. 34, 416 S.E.2d at 648.

4. 482 U.S. 496 (1987), *overruled by* *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

5. 490 U.S. 805 (1989), *overruled by* *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

6. *Lucas*, 308 S.C. at 33, 416 S.E.2d at 647.

7. 111 S. Ct. 2597 (1991).

8. *See Lucas*, 308 S.C. at 33, 416 S.E.2d at 647.

9. Brief of Respondents at 1.

10. *Id.*

11. *Lucas*, 308 S.C. at 33, 416 S.E.2d at 647.

12. *Id.*

13. *State v. Lucas*, 285 S.C. 37, 328 S.E.2d 63, *cert. denied*, 472 U.S. 1012 (1985). *State v. Lucas* was overruled by *State v. Torrence*, 305 S.C. 45, 69 n.13, 406 S.E.2d 315, 328 n.5 (1991), but only to the extent that it required *in favorem vitae* review.

conviction relief (PCR), but the court denied the petition.¹⁴ Lucas appealed the denial, but the South Carolina Supreme Court affirmed.¹⁵

Prior to *Payne v. Tennessee*, few previous decisions of the South Carolina Supreme Court addressed the admissibility of victim impact evidence. Lucas claimed that *State v. Allen*¹⁶ "'condemned' a solicitor's reference to the victim's family."¹⁷ However, the State pointed out that the *Allen* court actually found that the impact of the death upon a victim's family was a consequence of the crime.¹⁸ In addition, the State noted that two prior decisions, *State v. Middleton*¹⁹ and *State v. Bell*,²⁰ both upheld comments about the memories of victims.²¹ Finally, the State cited *State v. South*,²² in which the court found no reversible error when a prosecutor placed the deceased officer's badge on the floor and made references to the victim's family during the closing argument.²³

In *Payne v. Tennessee* the United States Supreme Court allowed states to choose whether victim impact evidence should be admissible in prosecutorial arguments.²⁴ The Court stated:

[I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.²⁵

14. *Lucas*, 308 S.C. 33, 416 S.E.2d at 647.

15. *Id.* at 34, 416 S.E.2d at 648.

16. 266 S.C. 468, 224 S.E.2d 881 (1976), *overruled on other grounds by* *State v. Evans*, 307 S.C. 477, 415 S.E.2d 816 (1992) and *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

17. Brief of Petitioner at 9. Lucas also pointed to *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (per curiam), *cert. denied*, 471 U.S. 1120 (1985), and *overruled by* *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), in which the court held that evidence of the victim's bad character is not admissible as mitigating evidence during sentencing. Brief of Petitioner at 29.

18. Brief of Respondents at 31. "The solicitor, in referring to the family, was commenting upon the consequences of the defendant's act [W]e cannot say that the argument of the solicitor was prejudicial so as to require a new trial." *Allen*, 266 S.C. at 486, 224 S.E.2d at 888.

19. 295 S.C. 318, 368 S.E.2d 457, *cert. denied*, 488 U.S. 872 (1988).

20. 302 S.C. 18, 393 S.E.2d 364, *cert. denied*, 498 U.S. 881 (1990).

21. Brief of Respondents at 23.

22. 285 S.C. 529, 331 S.E.2d 775, *cert. denied*, 474 U.S. 888 (1985).

23. Brief of Respondents at 23.

24. *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991).

25. *Id.* at 2609.

Accordingly, the South Carolina Supreme Court adopted this reasoning in *State v. Johnson* when it ruled that the solicitor's reference to the victim's family was relevant to the jury's decision.²⁶ Relying on the adoption of *Payne*, the *Lucas* court stated that "victim impact evidence, as any other relevant evidence, is admissible so long as it is not 'so unduly prejudicial that it renders the trial fundamentally unfair.'"²⁷ The South Carolina Supreme Court then held that the prosecutor's comments in *Lucas* did not render the trial "fundamentally unfair."²⁸ The court reasoned that, following *Payne*, references to the impact of the murder upon the victim's family and the personal characteristics of the victim's family were evidence relevant for the jury's consideration.²⁹ Inherent in this reasoning is the conclusion that these references to victim impact evidence do not automatically violate the defendant's Eighth Amendment rights under the United States Constitution. Therefore, the supreme court held that the solicitor's references were sanctioned by *Payne*.³⁰

Lucas also asserted that South Carolina's legislature statutorily prohibited the admission of victim impact evidence in capital proceedings, thereby narrowing the constitutional latitude provided to the states by *Payne*.³¹ In 1984 the legislature enacted section 16-3-1550 (which deals with victim impact statements) as part of the Victim's and Witness's Bill of Rights.³² Lucas argued that this statutory enactment excluded victim impact statements from capital sentencing proceedings.³³ This argument rests on the language of section 16-3-1550(A) which states that "[t]he provisions of this section govern the disposition of any offense within the jurisdiction of the General Sessions Court, excluding any crime for which a sentence of death is sought."³⁴ Lucas argued that this section "can only be read as expressing a legislative intent to exclude victim impact evidence from the capital sentencing process."³⁵ However, the State argued that section 16-3-1550 attempted to develop a form for use by trial judges and various correctional agencies to

26. 306 S.C. 119, 132, 410 S.E.2d 547, 555 (1991) (quoting *Payne*, 111 S. Ct. at 2069), cert. denied, 112 S. Ct. 1691 (1992).

27. *Lucas v. Evatt*, 308 S.C. 31, 33, 416 S.E.2d 646, 647 (1992) (quoting *Payne*, 111 S. Ct. at 2608).

28. *Id.* at 34, 416 S.E.2d at 648.

29. *Id.*

30. *Id.* at 34, 416 S.E.2d at 647.

31. Brief of Petitioner at 10-12.

32. S.C. CODE ANN. § 16-3-1550 (Law. Co-op. 1985 & Supp. 1992). In relevant part the statute gives the victim a "right to submit to the court, orally or in writing at the victim's option, a victim impact statement to be considered by the judge at the sentencing or disposition hearing in general sessions court." *Id.* § 16-3-1550(B).

33. Brief of Petitioner at 11.

34. S.C. CODE ANN. § 16-33-1550(A) (Law. Co-op. 1985).

35. Brief of Petitioner at 11.

itemize a victim's loss.³⁶ The statute created a victim impact statement to ensure that restitution to victims and the consequences of the crime would be considered.³⁷ Moreover, the State argued that this section contains no confrontation requirement.³⁸ Therefore, the provisions of section 16-3-1550 cannot apply to bifurcated death penalty sentencing proceedings because such proceedings necessarily include the right of confrontation.³⁹ The statutory creation of the victim impact statement does not mean that any matter included on such a form can never be presented to a jury in a capital sentencing proceeding.⁴⁰ If such matters were automatically excluded, a jury would never learn the "identity of the victim, any physical injury suffered by the victim, and any other information related to the impact of the offense upon the victim" as provided in section 16-3-1550(D).⁴¹ Because *Lucas* does not address this argument, the supreme court implicitly ruled that South Carolina statutory law does not exclude victim impact evidence in a capital sentencing proceeding.

Because South Carolina has adopted the reasoning of *Payne v. Tennessee*,⁴² a closer look at the language in *Payne* is warranted. *Payne* stated that "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant" and not turn the "victim into a 'faceless stranger at the penalty phase of a capital trial.'" ⁴³ The *Payne* majority was concerned about tilting the advantage too far toward the defendant's side in capital sentencing proceedings. The Court stated: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."⁴⁴ Justice Scalia, in his concurring opinion, further explained that "[t]he Court correctly observes the injustice of requiring the exclusion of *relevant* aggravating evidence during capital sentencing, while requiring the admission of all relevant mitigating

36. Brief of Respondents at 34.

37. *Id.*

38. *Id.* at 35.

39. *Id.*

40. *Id.*

41. Brief of Respondents at 35; see S.C. CODE ANN. § 16-3-1550(D) (1), (3), (6) (Law. Co-op. 1985).

42. See *Lucas v. Evatt*, 308 S.C. 31, 416 S.E.2d 646 (1992); *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991), *cert. denied*, 112 S. Ct. 1691 (1992).

43. *Payne v. Tennessee*, 111 S. Ct. 2597, 2608 (1991) (quoting *South Carolina v. Gathers*, 490 U.S. 805, 821 (1989) (O'Connor, J., dissenting), *overruled by Payne v. Tennessee*, 111 S. Ct. 2597 (1991)).

44. *Id.* at 2609 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)).

evidence."⁴⁵ Finally, still from the victim's perspective, Justice Scalia stated that the notion "that a crime's unanticipated consequences must be deemed 'irrelevant' to the sentence conflicts with a public sense of justice keen enough that it has found voice in a nationwide 'victim's rights' movement."⁴⁶

As acknowledged by the *Lucas* dissent, the *Payne* Court sought to balance the concept of fairness evenly between the state and the accused.⁴⁷ However, the *Payne* and *Lucas* dissenters reasoned that allowing victim impact evidence at a capital sentencing proceeding violates the defendant's Eighth Amendment constitutional rights.⁴⁸

After *Payne*, victim impact evidence is arguably still subject to two forms of constitutional attack. First, when the evidence is unduly prejudicial, then presumably the defendant's due process rights are violated.⁴⁹ Second, while *Payne* removed *Booth's* *per se* prohibition of evidence about the victim and the effects of the murder (requiring the constitutionality of such evidence to be reviewed on a case-by-case basis), *Payne* expressly left undisturbed *Booth's* Eighth Amendment ban on victim "opinion" evidence by family members of the victim.⁵⁰

Closely linked to the constitutional issues in *Lucas* are the policy issues that concern the majority and dissenting justices in *Payne* and *Lucas*. The *Payne* majority sought to further a policy of fairness by balancing the rules of evidence in capital sentencing proceedings.⁵¹ Yet the *Payne* dissent was concerned that the danger remains for the door to open to arbitrary and prejudicial capital sentencing decisions.⁵²

45. *Id.* at 2613 (Scalia, J., concurring) (emphasis added).

46. *Id.* (citation omitted).

47. *Lucas v. Evatt*, 308 S.C. 31, 36, 416 S.E.2d 646, 649 (1992) (Finney, J., dissenting).

48. In *Lucas* Justice Finney believed "that the majority's holding constitutes a substantive denigration of the Eighth Amendment." *Lucas*, 308 S.C. at 37, 416 S.E. 2d at 649.

Justice Stevens in *Payne* noted that the Court's greatest concern should lie with cases in which victim impact evidence *will* make a difference in sentencing proceedings. *Payne*, 111 S. Ct. at 2630 (Stevens, J., dissenting).

In those cases, defendants will be sentenced arbitrarily to death on the basis of evidence that would not otherwise be admissible because it is irrelevant to the defendants' moral culpability. The Constitution's proscription against the arbitrary imposition of the death penalty must necessarily proscribe the admission of evidence that serves no purpose other than to result in such arbitrary sentences.

Id. at 2630-31.

49. "If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." *Payne*, 111 S. Ct. at 2612 (O'Connor, J., concurring).

50. *Id.*; Brief of Petitioner at 24.

51. See *supra* notes 43-47 and accompanying text.

52. *Payne*, 111 S. Ct. at 2628-30 (Stevens, J., dissenting).

To understand the dissent's concern, it may be useful to review previous cases that refused to allow victim impact evidence in capital sentencing proceedings. In *South Carolina v. Gathers*,⁵³ Justice Brennan, writing for the majority, stated that "[f]or purposes of imposing the death penalty . . . [the defendant's] punishment must be tailored to his personal responsibility and moral guilt."⁵⁴ "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."⁵⁵ In *Booth v. Maryland*,⁵⁶ the majority believed that the sole criteria by which the level of punishment should be determined was the "blameworthiness" of the defendant.⁵⁷ Yet in *Booth*, Justice Powell stated that "[t]he focus of a VIS [victim impact statement], however, is not on the defendant, but on the character and reputation of the victim and the effect on his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant."⁵⁸ Additionally, Justice Powell noted that a jury's reliance on such evidence "could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill. This evidence thus could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime."⁵⁹

However, not everyone agrees that the blameworthiness of the defendant should be the sole determinant of punishment in death penalty cases. Justice Scalia stated the following:

The principle upon which the Court's opinion rests—that the imposition of capital punishment is to be determined solely on the basis of moral guilt—does not exist, neither in the text of the Constitution, nor in the historic practices of our society, nor even in the opinions of this Court.⁶⁰

Justice O'Connor later argued that the defendant's culpability must be determined by considering the extent of harm caused.⁶¹ Justice O'Connor

53. 490 U.S. 805 (1989), *overruled by* *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

54. *Id.* at 810 (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

55. *Id.* (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)). *But see* Paul Boudreaux, *Booth v. Maryland and the Individual Vengeance Rationale for Criminal Punishment*, 80 J. CRIM. L. & CRIMINOLOGY 177, 183-90 (1989) (analyzing punishment based on an individual vengeance rationale as opposed to a retribution rationale and questioning the assumption that retribution should be the sole rationale for imposing a capital sentence).

56. 482 U.S. 496 (1987), *overruled by* *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

57. *See Booth*, 482 U.S. at 502; *see also* Boudreaux, *supra* note 55, at 180 (discussing the Court's reliance on blameworthiness criteria).

58. *Booth*, 482 U.S. at 504.

59. *Id.* at 505.

60. *Id.* at 520 (Scalia, J., dissenting).

61. *South Carolina v. Gathers*, 490 U.S. 805, 818 (1989) (O'Connor, J., dissenting).

observed that no state authorizes the death penalty for attempted murder, yet the defendant has the same mental state in this situation as does a murderer. The only distinction is the harm that results from the defendant's actions.⁶² Nothing in the Eighth Amendment expressly prevents the consideration during sentencing of the victim's qualities or the loss to society.⁶³ However, one commentator reasoned that while Justice O'Connor's argument supports the proposition that whether a victim lives or dies is relevant to the sentencing decision, it does not deem the victim's personal qualities relevant.⁶⁴

The *Booth* majority noted that a jury's discretion at a capital sentencing proceeding must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."⁶⁵ The majority stated that such evidence would only "inflame the jury" and a death sentence "must 'be, and appear to be, based on reason rather than caprice or emotion.'"⁶⁶ The *Booth* majority went on to hold that admission of such evidence violates the Eighth Amendment by creating a constitutionally unacceptable risk that the jury could sentence a defendant to death in an arbitrary manner.⁶⁷

Such potential for arbitrary and prejudicial decisions could undermine "the goal of even-handed application of capital punishment."⁶⁸ Consideration of the murder victim's "worth" could "exacerbate the risk of unjustifiable racial disparities in the way the death penalty is meted out."⁶⁹ Furthermore, such evidence has the potential "to obliterate the predictability of capital punishment."⁷⁰ Finally, admission of victim impact evidence arguably invites juries and potential murderers to predict which types of murders will result in the death penalty. For example, victim impact evidence will not likely be offered when the victim is a drifter with no known family members; whereas such evidence may be very persuasive when the victim is a doctor who is the head of a large family practice. In other words, some people will be viewed as more worthy of living than others due to their perceived value to society and their families.⁷¹ Juries could, in effect, decide on the death penalty with

62. *Id.* at 819.

63. *Id.*

64. Eric S. Newman, *Eighth Amendment—Prosecutorial Comment Regarding the Victim's Personal Qualities Should Not Be Permitted at the Sentencing Phase of a Capital Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1236, 1250 (1990).

65. *Booth v. Maryland*, 482 U.S. 496, 502 (1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)).

66. *Id.* at 508 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

67. *Id.* at 502-03.

68. Brief of Petitioner at 13.

69. *Id.*

70. *Id.* at 15.

71. *Id.* *Payne* responded to this argument by stating that "victim impact evidence is not offered to encourage comparative judgments of this kind It is designed to show instead *each* victim's 'uniqueness as an individual human being.'" *Payne v. Tennessee*, 111 S. Ct. 2597,

broad discretion and with few meaningful legislative restraints to prevent prejudice or insure consistency.⁷²

However, even relevant victim impact evidence may be excluded if it is unduly prejudicial. Federal Rule of Evidence 403 deals with the exclusion of relevant evidence.⁷³ Although no statutory equivalent exists to rule 403, South Carolina courts have adopted a version of the federal rule.⁷⁴

The next issue involves what amounts to “undue prejudice” and who makes the determination. Many courts have recognized that evidence which is merely adverse to an opposing party does not constitute undue prejudice.⁷⁵ “‘Virtually all evidence is prejudicial or it isn’t material. The prejudice must be “unfair.”’⁷⁶ “[U]nfair prejudice’ means an ‘undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.’”⁷⁷ Obviously, a prosecutor risks undue prejudice by using victim impact evidence because it may sometimes result in a verdict based on emotion, rather than level-headed deliberation. However, in every case, trial judges are traditional guards against the inflammatory risk of evidence because they control the proceedings within the parameters of due process. South Carolina statutory law requires the trial judge to ensure that no death sentence is the “result of prejudice, passion, or any other arbitrary factor.”⁷⁸ Therefore, although there is a risk of prejudice by using victim impact evidence, checks in the judicial system exist and are designed to control the prejudice.

Some disagreement remains over the actual scope of the *Payne* rule and how much discretion a state should have in deciding whether to admit victim impact evidence. While not mandating the admission of such evidence, *Payne* affords the states discretion in deciding whether to admit such evidence. Consequently, a couple of questions remain: 1) If a state allows victim impact

2607 (1991).

72. *Id.*

73. Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.

74. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). “It is now the overwhelming majority rule that relevant evidence may be excluded for undue prejudice even though no specific exclusionary rule requires exclusion.” *Id.* at 382, 401 S.E.2d at 149 (citing 1 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 10a (Peter Tillers rev., 3d ed., Little, Brown & Co. 1983)).

75. See 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE § 403[03] (1993).

76. *Id.* (quoting *Dollar v. Long MFG., N.C., Inc.*, 561 F.2d 613, 618 (5th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978)).

77. *Id.* (quoting FED. R. EVID. 403 advisory committee’s note).

78. S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 1992).

evidence, what future developments in the litigation process may arise due to this change in criminal law? and 2) What additional limits, (other than the "unduly prejudicial" test), will be placed on the admission of this evidence?

Once victim impact evidence is allowed in capital sentencing proceedings, some troubling new developments and problems may arise. In addition to the risk of arbitrary and capricious sentencing decisions already discussed, a state which allows victim impact evidence may open the door to evidence about the victim (*i.e.*, previous suicide attempts, a serious criminal record, testing HIV-positive during the autopsy).⁷⁹ The emotional impact on the jury of such seemingly irrelevant information may be decisive in some cases. "Such negative 'victim impact' evidence could change not only the way that evidence is admitted and considered at trial, but also the way murder cases are investigated."⁸⁰ A lot of information about a victim's background will be revealed as defendants attempt to minimize the portrayed loss to society resulting from their crime.

Another development in litigation may involve defendants presenting evidence about the probable effect of their executions upon their family. Lucas argued that capital sentencing courts will be pushed into "unchartered seas of irrelevance."⁸¹ In essence Lucas argued that admission of victim impact evidence would turn sentencing proceedings into battles based on irrelevant facts and allegations.⁸² Lucas cited a pending capital appeal in which defense counsel asserted the right to prove that the murder victim was a prostitute and a drug smuggler.⁸³ Arguably, this presents "the other side of the *Payne* coin."⁸⁴

Once victim impact evidence is allowed, limits must be set to avoid constitutional problems. For example, the court may instruct prosecutors not to present such evidence in bad faith in an effort to play on the jury's passion. Rather, a prosecutor should simply present the evidence necessary to provide the jury "a 'glimpse of the life' [the] defendant 'chose to extinguish.'"⁸⁵ Other suggested safeguards exist to ensure that such evidence does not become the focus of the sentencing decision. One example is for the judge to instruct the sentencing jury to consider all evidence, including all mitigating evi-

79. Brief of Petitioner at 16-17.

80. *Id.* at 17.

81. *Id.* at 23 (quoting *Payne v. Tennessee*, 111 S. Ct. 2597, 2627 (1991) (Stevens, J., dissenting)).

82. Reply Brief of Petitioner at 4.

83. *Id.* (citing *State v. Cooper*, No. 90-GS-32-0083, -84 (Lexington County Ct. of Gen. Sess., S.C. February 11-22, 1991)).

84. *Id.* at 5.

85. See *South Carolina v. Gathers*, 490 U.S. 805, 816 (1989) (O'Connor, J., dissenting) (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)), *overruled by Payne v. Tennessee*, 111 S. Ct. 2597 (1991)).

dence.⁸⁶ Another example is to exclude evidence of financial losses, which is more of a tort concern than a criminal law concern.⁸⁷

In conclusion, South Carolina has adopted the rule from *Payne* as state law,⁸⁸ allowing the state legislature to authorize (or refuse to exclude) victim impact evidence in capital sentencing proceedings. However, such evidence is still subject to traditional due process constraints. *Lucas* potentially provides new litigation options at future capital sentencing proceedings. Furthermore, this change in criminal law is recent, and the court will likely be forced to reconsider the *Lucas* rule and the state of victim impact evidence under South Carolina statutory law.⁸⁹

John G. Felder, Jr.

II. FOURTH CIRCUIT ADDRESSES PLEA AGREEMENTS MADE PURSUANT TO UNITED STATES SENTENCING COMMISSION GUIDELINE

In *United States v. Fant*¹ the Fourth Circuit Court of Appeals held that if the government executes a plea agreement pursuant to Section 1B1.8 of the

86. See *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting), *overruled by* *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

87. See Boudreaux, *supra* note 55, at 193.

88. It may be interesting to consider how other jurisdictions have treated victim evidence in the wake of *Payne*. The following states have followed the *Payne* rule and do not exclude relevant victim impact evidence in capital proceedings unless it is prejudicial: *McMillian v. State*, 594 So. 2d 1253 (Ala. Crim. App. 1991); *State v. Atwood*, 832 P.2d 593 (Ariz. 1992) (en banc), *cert. denied*, 113 S. Ct. 1058 (1993); *People v. Pride*, 833 P.2d 643 (Cal. 1992) (en banc), *cert. denied*, 113 S. Ct. 1323 (1993); *Owen v. State*, 596 So. 2d 985 (Fla.) (per curiam), *cert. denied*, 113 S. Ct. 338 (1992); *State v. Card*, 825 P.2d 1081 (Idaho 1991), *cert. denied*, 113 S. Ct. 321 (1992); *People v. Hope*, 589 N.E.2d 503 (Ill. 1992); *Davis v. State*, 598 N.E.2d 1041 (Ind. 1992), *petition for cert. filed*, No. 93-5025 (June 3, 1993); *State v. Bernard*, 608 So. 2d 966 (La. 1992); *Booth v. State*, 608 A.2d 162 (Md.), *cert. denied*, 113 S. Ct. 500 (1992); *Jenkins v. State*, 607 So. 2d 1171 (Miss. 1992) (en banc); *State v. Williams*, 480 N.W.2d 390 (Neb. 1992); *Homick v. State*, 825 P.2d 600 (Nev. 1992) (per curiam); *State v. Richey*, 595 N.E.2d 915 (Ohio 1992), *cert. denied*, 113 S. Ct. 1592 (1993). Georgia agrees with the rule from *Payne*, but does not allow admission of victim impact evidence because it violates state law. *Sermons v. State*, 417 S.E.2d 144 (Ga. 1992). Texas refuses to follow *Payne*, reasoning that its state statutory and common law exclude victim impact evidence. *Ex Parte Porter*, 827 S.W.2d 324 (Tex. Crim. App. 1992) (en banc).

89. In *State v. Rocheville*, decided January 4, 1993, the defendant argued that testimony of the victims' parents at the sentencing phase violated South Carolina law. ___ S.C. ___, 425 S.E.2d 32, 36 (1993). The South Carolina Supreme Court upheld the admission of the parents' testimony relying on *Lucas v. Evatt*, 308 S.C. 31, 416 S.E.2d 646 (1992) and S.C. CODE ANN. § 16-3-25(C) (Law. Co-op. 1985).

1. 974 F.2d 559 (4th Cir. 1992).

United States Sentencing Commission Guidelines and agrees not to use self-incriminating information to increase the defendant's sentencing guideline range, then the government is also prohibited from using any self-incriminating statements the defendant subsequently makes to probation officers.²

In October of 1990, South Carolina State Representative Ennis Fant was indicted for conspiracy to commit extortion.³ Fant pleaded guilty and entered a plea agreement with the federal government pursuant to U.S.S.G. Section 1B1.8.⁴ Under the agreement, Fant promised to "cooperate with government officials in return for the government's promise that any evidence obtained as a result of that cooperation would not be used to determine the applicable guideline range [under the U.S.S.G.] at [his] sentencing hearing."⁵ After Fant executed the plea agreement,⁶ he gave information to his probation officers⁷ that indicated he had committed an obstruction of justice.⁸ Subse-

2. *Id.* at 564.

3. *Id.* at 560. The government indicted Fant "on one count of conspiracy to commit extortion, and on two substantive counts of extortion under color of official right (taking a bribe as a public official) in violation of 18 U.S.C. §§ 1951 and 1952 ('the Hobbs Act')."

The indictment of Fant and of other lawmakers arose out of the undercover "Operation Lost Trust" investigation conducted by the Federal Bureau of Investigation and the United States Attorney. Brief of Appellant at 1.

4. U.S.S.G. § 1B1.8(a) (1991) states:

Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

5. *Fant*, 974 F.2d at 561. The relevant part of the plea agreement stated:

The Government agrees that any self-incriminating information provided by the Defendant . . . as a result of his compliance with the terms of this Agreement, although available to the Court, will not be used against the Defendant . . . in determining the Defendant's applicable guideline range for sentencing pursuant to the U.S. Sentencing Commission Guidelines. The provisions of this paragraph shall not be applied to restrict the use of such information: (A) known to the Government prior to the date of this Agreement; (B) in a prosecution for perjury or giving a false statement; (C) in the event there is a breach of the cooperation Agreement.

Id. (citing U.S.S.G. § 1B1.8 (b)).

6. Fant and the government executed a plea agreement on February 22, 1991. *Id.*

7. The court stated that Fant "gave testimony to FBI Agents, acting in the capacity of probation officers." *Id.* However, in its brief, the United States emphasized that Fant gave testimony to the "probation office." Brief of Appellee at 9. Fant contended that he gave his statement to the "probation officer." Brief of Appellant at 10. Although the opinion does not clearly address which branch of "the government" took Fant's statement, this apparent inconsistency did not affect the reasoning of the court. See *infra* text accompanying notes 35-38.

8. Specifically, Fant told both the FBI and the "probation officers" that after hearing from a colleague about a possible FBI investigation of the state legislature, he reported the money he received from FBI informant Ron Cobb as a campaign contribution. Brief of Appellant at 3.

quent to the execution of the plea agreement, Fant gave the same self-incriminating information to the prosecution, who in turn used it to prove the guilt of Fant's fellow wrongdoers.⁹ The prosecution conceded that Fant's information was of "particular assistance."¹⁰ However, based on Fant's incriminating statement to the probation officers, the United States Attorney submitted an amended presentencing report recommending a two-level enhancement for obstruction of justice pursuant to U.S.S.G. Section 3C1.1.¹¹ This report increased Fant's guideline range from 21-27 months to 27-33 months.¹² The Fourth Circuit noted that the trial court "*relied upon* the statement cited in the presentencing report when it applied the two-level enhancement for obstruction of justice."¹³ In sum, Fant's sentence was substantially increased because of his statement to the probation officers after the execution of the plea agreement.

After an immediate denial of his motion to reconsider the addition of the two-level enhancement to his sentence,¹⁴ Fant appealed to the Fourth Circuit. He argued that the two-point increase in his guideline range violated the plea agreement. Fant pointed out the give-and-take nature of the plea agreement, and asserted:

[I]t would be fundamentally unfair to allow a two-point increase Under the terms of his plea agreement Fant was obligated to be truthful with agents of the FBI and the United States Attorney's Office. In return, the Government agreed that any new information he provided would not be utilized against him.¹⁵

In return, the United States argued that "the probation office performs an independent function of investigating all aspects of the defendant's background There is nothing in this record to suggest that the defendant's statements to the *government* were in any way used against him"¹⁶

Thus, the principal question for the court was whether the "government," as a party to the plea agreement, comprised not only the FBI and United States

9. See *Fant*, 974 F.2d at 563 n.5; Brief of Appellant at 10-11; Brief of Appellee at 8.

10. *Fant*, 974 F.2d at 563 n.5. The statement formed the basis of the government's motion for downward departure pursuant to U.S.S.G. § 5K1.1. See *infra* note 46.

11. *Fant*, 974 F.2d at 561. U.S.S.G. § 3C1.1 provides: "If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels."

12. Brief of Appellant at 4.

13. *Fant*, 974 F.2d at 562 (emphasis added).

14. *Id.* at 561.

15. Brief of Appellant at 11 (citation omitted).

16. Brief of Appellee at 9 (emphasis added).

Attorney, but also the probation officers.¹⁷ The Fourth Circuit answered this question in the affirmative, concluding that "the restriction set out in § 1B1.8, preventing the use of self-incriminating statements made by a cooperating defendant, applies to statements made to probation officers which are later incorporated into presentencing reports."¹⁸

The court reached its conclusion by strictly construing the plea agreement, noting that the terms of the plea agreement proscribe the use of "any self-incriminating information"¹⁹ which Fant provided the government.²⁰ "Although the probation officer to whom appellant made his statement was not a directly adverse party, the officer was an involved government employee, and the statement was made as a result of appellant's compliance with the agreement."²¹ Although United States insisted that statements made to probation officers were distinguishable from the statements made to the government, the court found it to be "a substantially false distinction."²² Furthermore, the court did not draw any such distinction from the express language of U.S.S.G. Section 1B1.8, upon which the plea agreement was based.²³

In response to Fant's argument that the two-point increase in his sentencing guideline range was "fundamentally unfair,"²⁴ the court quoted

17. Another point of contention was the applicable standard of review on appeal. In its brief, the United States quickly pointed out that Fant failed to address the government's alleged violation of the plea agreement in the district court, "and thus this court can only review it if it finds that this issue is plain error 'affecting substantial rights.'" Brief of Appellee at 7-8 (quoting FED. R. CRIM. P. 52(b)). Further, the United States asserted that "[t]o be 'plain error' the case must be 'exceptional.'" Brief of Appellee at 8 (quoting *United States v. Maxton*, 940 F.2d 103, 105 (4th Cir.), *cert. denied*, 112 S. Ct. 398 (1991)).

Fant challenged the government's contention that the standard of review was plain error by arguing that "[a] perusal of Rule 52(b) does not disclose that it was meant to apply to sentencing hearings, but in fact was meant to apply to errors at trial." Reply Brief of Appellant at 1. He further argued that "[e]ven if the standard is plain error, it is clear that plain error exists in this matter." *Id.* Holding that the applicable standard of review was indeed plain error, the court agreed with Fant that plain error existed. *Fant*, 974 F.2d at 565; *See also infra* note 34.

18. *Fant*, 974 F.2d at 564.

19. *Id.* at 562; *see supra* note 5.

20. *Fant*, 974 F.2d at 562. The court also noted that the plea agreement placed certain limits on Fant's immunity, but that those limits did not apply in this case. *Id.*

21. *Id.*

22. *Id.* at 563. The court also refused to find a requirement that the probation officers be "agents" of the prosecution before the plea agreement would preclude the use of self-incriminating statements to those officers. *See id.* But *see supra* note 7.

23. *Fant*, 974 F.2d at 563. Referring to the current version of section 1B1.8, the court stated that it "offers no suggestion of a limitation or preclusion of the use of incriminating statements based on whether the government official eliciting the statements was a prosecution official or some other government representative." *Id.*

24. Brief of Appellant at 11.

United States v. Malvito,²⁵ a previous Fourth Circuit case construing section 1B1.8. The *Malvito* court stated: "The government is entitled to promise that it will not use information gained under a cooperation agreement against the defendant, and the defendant is entitled to trust that promise."²⁶ Moreover, according to the *Malvito* court, the policy underlying plea agreements—extracting valuable information from the defendant that will lead to other convictions—militates against allowing the government to go back on its agreement.²⁷ The court noted that allowing the government to "side-step its promise . . . would drastically restrict the candor of informants, potentially impeding the flow of information from an indispensable source and undermining the credibility of the criminal court system and the promises made by its officers."²⁸

Noting a conflict among the circuit courts as to whether statements made to a probation officer pursuant to a section 1B1.8 plea agreement may be used to enhance defendant's guideline range,²⁹ the court stated that the new Application Note 5 to section 1B1.8³⁰ clearly resolves the conflict.³¹ Application Note 5 provides that section 1B1.8 limits the use of incriminating information not only in the government's presentation of the information, but also in its determination of the defendant's guideline range.³² Moreover, the application note gives an example directly on point to the *Fant* case: "[W]here the defendant, subsequent to having entered into a cooperation agreement, provides such information to the probation officer preparing the presentence report, the use of such information remains protected by this section."³³ Although Application Note 5 was not in effect when *Fant* was sentenced, its direct applicability to *Fant*'s plea agreement appears to have been important to the court's resolution of the case.³⁴

25. 946 F.2d 1066 (4th Cir. 1991).

26. *Fant*, 974 F.2d at 563 (quoting *United States v. Malvito*, 946 F.2d 1066, 1068 (4th Cir. 1991)).

27. *See id.* at 564.

28. *Id.*

29. *Id.* The court referred to *United States v. Marsh* in which the Fifth Circuit held that "[t]he fact that a defendant provides the protected information to the probation officer does not alter our conclusion" that section 1B1.8 protects such information. *Id.* (quoting *United States v. Marsh*, 963 F.2d 72, 74 (5th Cir. 1992)). The court also noted that the Sixth Circuit has resolved the issue differently. *Id.* In *United States v. Miller* the Sixth Circuit held that "[s]tatements made to a probation officer . . . cannot be construed as information provided to the 'government' within the meaning of section 1B1.8(a)." 910 F.2d 1321, 1325 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 980 (1991).

30. U.S.S.G. § 1B1.8 Application Note 5 became effective November 27, 1991, after *Fant*'s sentencing but before the Fourth Circuit heard the case. *See Fant*, 974 F.2d at 564.

31. *Fant*, 974 F.2d at 564.

32. U.S.S.G. § 1B1.8 Application Note 5.

33. *Id.*

34. *See Fant*, 974 F.2d at 564. After finding that the government breached its plea agreement

One question remains regarding the breadth of the court's holding in *Fant*: How would the court have decided the case if *Fant* had disclosed the self-incriminating information only to the probation officer and not to the FBI? It appears that under the *Fant* rationale, the terms of the plea agreement would prohibit the government from using the information in determining *Fant*'s guideline range.

Even so, the court tended to obfuscate the definition and scope of the term "government." The court said that *Fant* "gave testimony to FBI Agents, acting in the capacity of probation officers."³⁵ However, in their respective briefs, *Fant* and the United States seem to argue that there were two statements: one to the FBI (as an agent of the prosecution) and one to the probation office.³⁶ Whether *Fant* made a statement only to the probation office, or whether he made a statement to both the FBI and the probation office is not determinative. The resolution of this issue—created at least in part by the court's own blurring of terms—should not alter the outcome of the case. What is crucial is that *Fant* relied on the plea agreement in making the statement to the probation office, and the probation office in turn amended the presentencing report to increase *Fant*'s sentencing guideline range. *Fant*'s decision to divulge self-incriminating information to the probation officers (be they the FBI acting in that capacity or actual probation officers) "was indisputably determined by the promise of sentencing immunity which he reasonably believed applied to those discussions."³⁷ Thus, self-incriminating statements made to probation officers in reliance upon a section 1B1.8 plea agreement are protected, regardless of whether the probation officers are agents of the prosecution, or whether the statements are made to the probation officers and not the FBI.³⁸

An analogy may clarify how *Fant*'s loquaciousness got him in trouble. He told the "left hand" (the prosecution) something and the left hand promised that the "body" (the government) would not use it against him. When he told the "right hand" (the probation office) the same thing that he had told the left hand, the body failed to keep its promise. One commentator states "[T]he guidelines raise the spectre that self-incriminating information divulged by the defendant while cooperating with the government could result in an increased guideline range."³⁹ This "spectre" became a reality for *Fant*.

with *Fant*, and that such a breach "serves to affect the integrity and public reputation of judicial proceedings," the court held that the breach constituted plain error. *Id.* at 565. Accordingly, the court vacated *Fant*'s sentence and remanded the case for resentencing. *Fant*, 974 F.2d at 565.

35. *Fant*, 974 F.2d at 561 (emphasis added).

36. See Brief of Appellant at 10-11; Brief of Appellee at 8.

37. *Fant*, 974 F.2d at 564 (emphasis added).

38. See *id.*

39. 1 PRACTICE UNDER THE NEW FEDERAL SENTENCING GUIDELINES 184 (Phyllis S.

One might ask how society is harmed if the government breaks its agreements with a confessed criminal. After all, the prosecution in this case could, and did, argue that technically it kept its agreement with Fant, in that a statement made to the probation office, an office that “performs an independent function,”⁴⁰ was not protected by the plea agreement between Fant and the “government.”⁴¹

The Fourth Circuit refused to allow the prosecution to abdicate its responsibility for keeping the government’s promises under plea agreements, and it correctly styled the prosecution’s tenuous proposition “a substantially false distinction.”⁴² To permit the government to breach its plea agreement, with one hand promising the defendant that self-incriminating information will not be used to increase his sentence, while the other hand recommends that the defendant receive an increased sentence on the basis of that same information is not only “fundamentally unfair,”⁴³ but also bad policy.

Although there is some truth in the United States’ argument that the probation office performs a separate function from the prosecution, the crucial element in plea agreements is the defendant’s reliance upon the government’s promise. To a frightened defendant facing the possibility of months, or even years, of incarceration in a federal prison, minor distinctions between the prosecution, probation officers, and the FBI mean very little. The defendants seek to lessen their sentence by revealing incriminating information about fellow wrongdoers. In the process defendants know, as does the prosecution, that they may divulge new incriminating information about themselves to the prosecution. Unless the defendants believe that they can rely on the government’s promise not to use such information against them, the prudent ones will simply keep silent and hope for the best. As such, the prosecution loses an opportunity to snare another wrongdoer.

At the bottom of *Fant* lies a pragmatic and unflinching recognition of simple human nature:

Unless a defendant can *feel secure* in the government’s promise of sentencing immunity, he faces a Hobson’s choice between losing a substantial assistance departure by (i) telling so much that the district court denies the departure because of the information he reveals and (ii) telling too little, being caught in it, and losing the government’s recommendation

. . . .⁴⁴

Bamberger & David J. Gottlieb eds., 2d ed. 1992).

40. Brief of Appellee at 9.

41. *See id.* at 8-9.

42. *Fant*, 974 F.2d at 563.

43. Brief of Appellant at 11. The unfairness is even more glaring in light of the Assistant United States Attorney’s admission that Fant’s statement was of “particular assistance” in determining the guilt of Fant’s colleagues. *See Fant*, 974 F.2d at 563 n.5.

44. *Fant*, 974 F.2d at 563 (quoting *United States v. Malvito*, 946 F.2d 1066, 1068 (4th Cir.

To answer the question posed earlier, if the government breaks its plea promises, society is harmed by a fostering of feelings of insecurity among guilty defendants who are deciding whether to inform on their fellow wrongdoers.⁴⁵ An insecure defendant may decide that if the government has broken its promise before, then it might do so again, and this defendant will likely remain silent about the crimes of other wrongdoers even though cooperation might lead to a lesser sentence.⁴⁶

The *Fant* decision should serve to reduce the uncertainty and insecurity that defendants face in making a "Hobson's choice," and result in an increase in the flow of information from defendants wishing to cooperate in exchange for a lessened sentence.

John D. Hawkins

III. FOURTH CIRCUIT ADDRESSES CONFLICT OF INTEREST ARISING FROM JOINT REPRESENTATION

In *United States v. Swartz*¹ the Fourth Circuit Court of Appeals applied the test developed in *Strickland v. Washington*² to conclude that the defendant's attorney labored under a conflict of interest arising out of joint representation.³ In so doing, the court held ineffective the defendant's attempt to waive the conflict of interest.⁴ The court found that the defendant did not waive the conflict "in a knowing, intelligent, and voluntary manner" because the magistrate's inquiry⁵ did not sufficiently warn the defendant of the particular conflict of interest that developed later in the proceeding when counsel argued a theory directly adverse to the defendant's interests.⁶ The court distinguished such a warning from one in which the judge warns the

1991)) (emphasis added).

45. See *id.* at 564.

46. See U.S.S.G. § 5K1.1 ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.").

1. 975 F.2d 1042 (4th Cir. 1992).

2. 466 U.S. 668 (1984); see *infra* notes 19-28 and accompanying text.

3. *Swartz*, 975 F.2d at 1048.

4. *Id.* at 1049.

5. The court must conduct a hearing to identify potential conflicts of interest and ensure that the defendant's waiver is knowing, intelligent, and voluntary. FED. R. CRIM. P. 44(c); see *infra* notes 31-35 and accompanying text.

6. *Swartz*, 975 F.2d at 1049.

defendant of the particular conflict of interest that indeed actually develops, in which case the defendant's waiver after the warning is still valid.⁷

Angela B. Swartz, along with her co-conspirator Weldon Waites, was indicted for various crimes involving conspiracy, bank fraud, and money laundering. Swartz and Waites agreed to joint representation by attorney David A. Fedor, and both executed a written waiver of the potential conflict of interest created by Fedor's multiple representation. Swartz and Waites first appeared as Fedor's joint clients before the United States Magistrate. Upon learning of the joint representation, the magistrate conducted an inquiry into the defendants' waiver. The magistrate generally informed Swartz and Waites of the potential conflicts of interest that can arise with joint representation of codefendants. Ultimately, the magistrate secured waivers from both Swartz and Waites of Fedor's potential conflicts of interest.⁸

Swartz and Waites executed plea agreements with the Government. However, unlike Waites, in Swartz's plea agreement the Government agreed to move for a downward departure of her sentence if she cooperated fully with the Government's investigation and prosecution of the other defendants involved in the bank scheme. At the plea acceptance, the court discussed the conflict with Fedor, but undertook no further Rule 44(c) inquiry at the arraignment. As the proceedings developed, Swartz approached Fedor twice concerning the conflict of interest, and Fedor assured her each time that he could adequately represent her.⁹

The district court again discussed the conflict with Fedor at the sentencing hearing, and Fedor reaffirmed his ability to adequately represent both defendants. However, during the sentencing hearing, Fedor argued for Waites in a matter directly adverse to Swartz's interest by equating the culpability of Swartz to that of Waites.¹⁰ This strategy inherently damaged Swartz's interests in her own sentencing which required portrayal of her as less culpable and more cooperative than Waites. The conflict of interest became even more pronounced when the government called Swartz to testify against Waites at the sentencing proceedings.¹¹

The district court denied Swartz's *pro se* motion seeking resentencing on the grounds that a violation of her Sixth Amendment right to effective assistance of counsel occurred. The district court concluded that she received the lowest appropriate sentence, and that her counsel's conflict of interest did

7. *Id.* at 1050.

8. *Id.* at 1043-44.

9. *Id.* at 1044-45.

10. The presentence reports and plea agreements reflected that Swartz was less culpable than Waites. *Id.* at 1046.

11. *Swartz*, 975 F.2d at 1047.

not affect that determination.¹² On appeal, the Fourth Circuit Court of Appeals vacated Swartz's sentence and remanded for resentencing.¹³

The Due Process Clause¹⁴ guarantees the right to a fair trial. The Sixth Amendment defines one of the basic elements of a fair trial as the right "to have the Assistance of Counsel for . . . defence."¹⁵ This language entitles the accused to assistance by an attorney who acts to ensure fairness by the trial court. Therefore, the United States Supreme Court recognized that "the right to counsel is the right to the effective assistance of counsel."¹⁶ Further, the right to effective assistance of counsel necessarily requires representation free from conflicts of interest.¹⁷ As the Supreme Court has said: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."¹⁸

The *Strickland* Court recognized two components necessary to reverse a conviction based on a defendant's claim of ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.¹⁹

First, stating that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,"²⁰ the *Strickland* Court developed several very general guidelines for determining the ineffectiveness of an attorney's performance such as: (1) "the defendant must show

12. *Id.*

13. *Id.* at 1050.

14. U.S. CONST. amends. V, XIV.

15. U.S. CONST. amend. VI.

16. *Strickland v. Washington*, 466 U.S. 668, 686 (1983) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

17. *See, e.g.*, *Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.").

18. *Strickland*, 466 U.S. at 686.

19. *Id.* at 687.

20. *Id.* at 688. The Court acknowledged that the American Bar Association standards reflect prevailing norms and serve as guides to determine reasonableness. *Id.*; *see also infra* notes 36-39 and accompanying text (discussing the ABA standards).

that counsel's representation fell below an objective standard of reasonableness;²¹ (2) evaluation of the attorney's performance must be highly deferential and must consider the attorney's perspective at the time of the alleged ineffective assistance;²² (3) "[t]he court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance;²³ and (4) the defendant must overcome the strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance."²⁴

Second, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."²⁵ However, as stated in *Cuyler v. Sullivan*,²⁶ prejudice is presumed when counsel is burdened by an actual conflict of interest.²⁷ A defendant who demonstrates "that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."²⁸ As stated in *United States v. Tatum*,²⁹ when legal representation requires an attorney "to account to two masters, an actual conflict exists when it can be shown that he took action on behalf of one. The effect of his action of necessity will adversely affect the appropriate defense of the other."³⁰

To ensure representation of defendants free from any conflict of interest, Rule 44(c) of the Federal Rules of Criminal Procedure provides a uniform mechanism for detecting potential attorney conflicts.³¹ Rule 44(c) attempts

21. *Strickland*, 466 U.S. at 688.

22. *Id.* at 689.

23. *Id.* at 690.

24. *Id.* at 689.

25. *Id.* at 692.

26. 446 U.S. 335 (1980).

27. *Id.* at 349-50 (citing *Glasser v. United States*, 315 U.S. 60, 76 (1942)); see also *Strickland*, 466 U.S. at 692 ("Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.").

28. *Cuyler*, 446 U.S. at 349-50 (citing *Holloway v. Arkansas*, 435 U.S. 475, 487-91 (1978)). Note that if the ineffectiveness claim is not based upon a conflict of interest, the defendant must affirmatively prove prejudice. See *id.* at 350 (citing *Glasser*, 315 U.S. at 72-75). Therefore, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

29. 943 F.2d 370 (4th Cir. 1991).

30. *Id.* at 376.

31. Unless the court knows or reasonably should know that a particular conflict exists, the trial court may assume that joint representation does not present any conflict absent a specific objection. *United States v. Ramsey*, 661 F.2d 1013, 1018 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982); see also *United States v. Akinseye*, 802 F.2d 740, 744 (4th Cir. 1986) ("If the court is aware, or should be aware, of a particular conflict, it should conduct a *sua sponte* inquiry

to avoid post-conviction claims for ineffective assistance of counsel resulting from joint representation by requiring that

the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.³²

The court's duty to inquire continues beyond the speculative inquiry in the early stages of the case and potentially entails further inquiry in light of any subsequent developments that suggest a potential conflict of interest.³³

Neither the Rule nor the advisory committee's notes specify the particular measures courts must take in conducting a proper inquiry, leaving this decision to a court's discretion.³⁴ However, the advisory committee's notes recommend some general guidelines:

[T]he district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections.³⁵

Additionally, in the representation of two or more criminal defendants, a conflict of interest threatens to violate not only the defendant's constitutional rights, but also the attorney's ethical responsibilities.³⁶ The American Bar Association standards explicitly prohibit an attorney from representing a client "if the representation of that client may be materially limited by the lawyer's responsibilities to another client" unless the representation falls within the provided exception.³⁷ However, "[t]he potential for conflict of interest in

into its existence."), *cert. denied sub nom. Ayodeji v. United States*, 482 U.S. 916 (1987).

32. FED. R. CRIM. P. 44(c).

33. *Id.* advisory committee's notes on 1979 amendment.

34. *See id.*

35. *Id.*

36. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1992).

37. *Id.* Rule 1.7(b) allows multiple representation if "the lawyer reasonably believes the

representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant."³⁸ Therefore, the Constitution as well as the Model Rules protect a defendant's interest in representation free of a conflicts of interest. The Constitution protects the defendant's interests after multiple representation commences while the Model Rules protect the defendant's interests even before the undertaking of multiple representation.³⁹

In *Holloway v. Arkansas*⁴⁰ the United States Supreme Court recognized that an attorney representing multiple defendants is in the best position both professionally and ethically to recognize the existence or potential development of a conflict of interest.⁴¹ Therefore, courts should look to the professional responsibility of lawyers for a solution to multiple representation problems. Although the primary responsibility for avoiding a conflict of interest lies with the attorney, these ethical responsibilities by no means render a rule 44(c) inquiry unnecessary, because "[e]ven the most diligent attorney may be unaware of facts giving rise to a potential conflict."⁴²

As observed in *Swartz*, although violative of his Sixth Amendment rights, a defendant may waive the right to representation free of conflicts of interest.⁴³ However, the waiver must be knowing, intelligent, and voluntary.⁴⁴ Rule 44(c) of the Federal Rules of Criminal Procedure serves to ensure that the defendant who waives a conflict of interest does so in such a knowing, intelligent, and voluntary manner.⁴⁵ The advisory committee, on amending Rule 44, stated: "It is, of course, vital that the waiver be established by 'clear, unequivocal, and unambiguous language.'"⁴⁶ Furthermore, in

representation will not be adversely affected; and the client consents after consultation." *Id.*

38. *Id.* advisory committee's notes on 1979 amendments.

39. See John S. Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 152-57 (1978).

40. 435 U.S. 475 (1978).

41. *Id.* at 485 (citing *State v. Davis*, 514 P.2d 1025, 1027 (Ariz. 1973) (en banc)).

42. FED. R. CRIM. P. 44(c) advisory committee's notes on 1979 amendments.

43. *Swartz*, 975 F.2d at 1048-49 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); *United States v. Akinseye*, 802 F.2d 740, 744-45 (4th Cir. 1986), *cert. denied sub nom. Ayodeji v. United States*, 482 U.S. 916 (1987)).

44. *Id.* at 1049 (citing *Akinseye*, 802 F.2d at 745).

45. *Id.*; see also *supra* text accompanying note 35.

46. FED. R. CRIM. P. 44(c) advisory committee's notes on 1979 amendment (quoting *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975)). "Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection." *Id.*

*Hoffman v. Leeke*⁴⁷ the Fourth Circuit Court stated that “[a] defendant cannot knowingly and intelligently waive what he does not know.”⁴⁸

Applying *Strickland*’s two-part standard,⁴⁹ the *Swartz* court concluded first, that the attorney Fedor labored under an actual conflict of interest during the sentencing proceedings;⁵⁰ and second, that the conflict of interest adversely affected his performance in representing *Swartz*.⁵¹

The *Swartz* court acknowledged that the defendant may waive such a conflict of interest if the waiver is knowing, intelligent, and voluntary:

When a defendant waives such a conflict after a properly-conducted rule 44(c) hearing, that conflict generally may not be the basis of a later claim of ineffective assistance of counsel.

However, a single waiver pursuant to rule 44(c) may not serve to waive all conflicts of interest that arise throughout the course of that defendant’s criminal proceedings. The district court has a continuing obligation under rule 44(c) to guard against conflicts of interest that may worsen as circumstances change during the course of the representation.⁵²

The court concluded that the strategy chosen by the attorney so changed the circumstances as to render the earlier waiver ineffective.⁵³ “*Swartz* could not have known at the time of her waiver of the serious nature of the conflict of interest that would later develop at her sentencing.”⁵⁴ Therefore, the court held the waiver ineffective and remanded the case for resentencing.⁵⁵

The court distinguished *United States v. Akinseye*,⁵⁶ in which the court warned the defendant of the precise form of conflict of interest that actually developed at the trial.⁵⁷ *Akinseye* involved a joint representation situation, and the court specifically warned the defendants that one could take the stand while the other remained silent.⁵⁸ Therefore, the pre-trial waiver remained effective when that conflict of interest actually arose.⁵⁹

47. 903 F.2d 280 (4th Cir. 1990).

48. *Id.* at 289, quoted in *Swartz*, 975 F.2d at 1049.

49. See *supra* text accompanying note 19.

50. *Swartz*, 975 U.S. at 1048.

51. *Id.* at 1048-49.

52. *Id.* at 1049 (citing *United States v. Akinseye*, 802 F.2d 740, 745 (4th Cir. 1986), cert. denied sub. nom. Ayodeji v. United States, 482 U.S. 916 (1987)).

53. *Id.*

54. *Id.*

55. *Swartz*, 975 F.2d at 1050.

56. 802 F.2d 740 (4th Cir. 1986), cert. denied sub nom. Ayodeji v. United States, 482 U.S. 916 (1987).

57. *Swartz*, 975 F.2d at 1049-50.

58. *Akinseye*, 802 F.2d at 745-76.

59. *Id.* at 746.

Thus, according to the *Swartz* court, a waiver is not knowing, intelligent, and voluntary unless the defendant knows of the precise form of the conflict of interest that eventually results.⁶⁰ Furthermore, the defendant is not in a position to know of such a conflict unless the judge, pursuant to Rule 44(c), warns the defendant of the particular conflict that eventually develops.⁶¹ Therefore, if the Rule 44(c) warning approaches the specificity as in *Akinseye*, the waiver is valid; but if the warning is general in nature, the waiver will be ineffective. This distinction comports with the court's continuing duty to apprise the defendant of the changing impact on his or her interests caused by the attorney's conflicting interests.⁶² At any stage during the proceedings, the court must conduct a further Rule 44(c) inquiry when the seriousness of a conflict of interest increases.

In addition to the Fourth Circuit, other jurisdictions recognize a defendant's inability to fully appreciate the development of a conflict of interest in multiple representation,⁶³ and at least one commentator agrees: "[E]ven where the defendant is sophisticated enough to appreciate the general implications of possible conflicts, the difficulty of an a priori assessment of the likelihood of conflict or the contexts in which conflicts might arise raises serious questions about the effectiveness of prospective waivers."⁶⁴ Moreover, at the beginning of the proceedings, the trial judge cannot likely foresee and explain to the defendant all possible conflicts that might arise in the case. For example, one cannot reasonably expect the *Swartz* court to have warned the defendant during the initial inquiry that his defense attorney might choose a strategy so shockingly adverse to the his interests.⁶⁵

At the beginning of the trial, when the judge first obtains the defendant's waiver of a conflict of interest after a Rule 44(c) inquiry, "the judge will not know the defenses to be raised on behalf of each defendant, the potential defenses to be foregone, the weight and sufficiency of the evidence to be adduced against each defendant, or each defendant's personal history and past criminal record."⁶⁶ Therefore, the judge will often find it impossible at the beginning of the proceedings to sufficiently warn the defendant of potential conflicts of interest *particular* to his case and to adequately appraise the defendant's waiver in light of these conflicts. The continuing obligation to reassess the waiver places a duty on the court to warn the defendants of potential conflicts as the proceeding develops. Then defendant can more

60. *Swartz*, 975 F.2d at 1050.

61. *Id.* at 1049-50.

62. *Id.* at 1049; *see also supra* text accompanying note 53.

63. *See, e.g., United States v. Gaines*, 529 F.2d 1038 (7th Cir. 1976) (holding defendant was not specifically warned of the risks of multiple representation).

64. Geer, *supra* note 39, at 141.

65. *See Swartz*, 975 F.2d at 1049.

66. Geer, *supra* note 39, at 141-42.

adequately understand a specific conflict and knowingly and intelligently waive his right to representation free of conflicts if he so chooses.

Because the defendant in *Swartz* did not receive an adequate warning, the court held the waiver invalid as not "knowing."⁶⁷ However, even knowing waivers are often not "intelligent," especially when obtained at the beginning of the proceedings. Even if the defendant receives a specific warning, the defendant often may not appreciate the seriousness of a conflict and its effects. In *Akinseye*, although the court held the waiver valid because the judge warned the defendant of the precise form of conflict that developed, the court stated that the better practice would have been for the trial court to conduct a further Rule 44 inquiry when the actual conflict arose.⁶⁸ However, the *Swartz* court declined to make this distinction, but instead focused on the specificity of the warning. If the defendant receives a warning at any point during the proceedings of the precise form of conflict that eventually arises, the waiver is valid. Therefore, although "knowing," the waiver may not be "intelligent."

In summary, a defendant's waiver of conflict-free representation is valid only if the defendant knows of a potential conflict of interest, based on the circumstances at the time of the waiver, that actually develops or worsens later in the proceeding. The required specificity of the trial court's joint representation inquiry and warning of possible conflicts of interest reinforces the continual obligation of the court to monitor the proceedings for new conflicts arising due to changed circumstances. Therefore, the goal of rule 44(c)—to avoid post-conviction claims based on ineffective assistance of counsel as a result of joint representation—becomes more obtainable by the court's mandate in *Swartz*.

Tracey Sloan Hinson

IV. COURT RULES MIRANDA VIOLATION IS A QUESTION OF LAW AND ALLOWS JURY TO CONSIDER HANDS AS DEADLY WEAPONS

In *State v. Davis*¹ the South Carolina Supreme Court determined that a jury must no longer find that criminal defendants received and understood their *Miranda* rights² before considering their confessions as evidence.³ Thus, the

67. *Swartz*, 975 F.2d at 1049.

68. *United States v. Akinseye*, 802 F.2d 740, 745 (4th Cir. 1986), *cert. denied sub nom. Ayodeji v. United States*, 482 U.S. 916 (1987).

1. ___ S.C. ___, 422 S.E.2d 133 (1992), *cert. denied*, 113 S. Ct. 2355 (1993).

2. *Miranda v. Arizona*, 384 U.S. 436 (1966). In this landmark decision, the Supreme Court held that an individual taken into custody

court limited its earlier decision of *State v. Adams*.⁴ Furthermore, the court held that under certain circumstances a jury may find that a hand or fist is a deadly weapon or object.⁵

Based in part on his confession, the jury found Thomas Lee Davis guilty of the murder, kidnapping, and first degree criminal sexual assault of college student Lisa Schmidt and sentenced him to death.⁶ Davis, who is mildly retarded,⁷ appealed to the South Carolina Supreme Court, which upheld the death sentence.⁸

In *Adams* the court held that a trial court should

impress upon the jury that no confession may be considered by it unless found beyond reasonable doubt to have been given freely and voluntarily under the totality of the circumstances. In addition, [if] the [defendant] was in custody at the time of his alleged confession,⁹ the jury must be convinced that he received and understood his Fifth and Sixth Amendment rights, as mandated by *Miranda v. Arizona*.¹⁰

However, the *Davis* court held that only the court, not the jury, determines whether a defendant's *Miranda* rights were violated.¹¹ According to *Davis*, whether defendants received and understood their *Miranda* rights are only two of several elements a jury must consider within the totality of the circumstances when assessing the voluntariness of a confession.¹²

must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479. Evidence obtained in violation of *Miranda* warnings cannot be used against a defendant. *Id.*

3. *Davis*, ___ S.C. at ___, 422 S.E.2d at 143-44.

4. 277 S.C. 115, 283 S.E.2d 582 (1981), *cert. denied*, 464 U.S. 1023 (1983). *Adams* was overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

5. *Davis*, ___ S.C. at ___, 422 S.E.2d at 144.

6. *Id.* at ___, 422 S.E.2d at 138.

7. Davis's I.Q. is approximately 66. *Id.* at ___ n.1, 422 S.E.2d at 138 n.1.

8. *Id.* at ___, 422 S.E.2d at 138.

9. The court did not address the question of custody in its decision, so one must assume that the defendant was in custody at the time of the confession.

10. *State v. Adams*, 277 S.C. 115, 123, 283 S.E.2d 582, 586 (1981), *cert. denied*, 464 U.S. 1023 (1983) (citations omitted). *Miranda v. Arizona*, 384 U.S. 436 (1966), did not actually address a defendant's Sixth Amendment rights.

11. *Davis*, ___ S.C. at ___, 422 S.E.2d at 143 (citing 23A C.J.S. *Criminal Law* § 1292 (1989) ("Whether a confession was free and voluntary so as to be competent evidence is a question for the court . . .")).

12. *Id.* at ___, 422 S.E.2d at 143.

The *Davis* court also held that a trial judge may charge the jury that a hand or fist could constitute a deadly weapon or object.¹³ The court last addressed this issue in *State v. Hariott*.¹⁴ In *Hariott* three young men were charged with assault and battery of a high and aggravated nature on a feeble, fifty-nine-year-old man. The court held that “[w]hile we are not prepared to say that the fist may not under some circumstances constitute an instrument which may inflict serious bodily injury, it is not generally regarded as a deadly weapon.”¹⁵

The *Davis* court cited *Hariott* to demonstrate that the court never eliminated the possibility that a hand or fist may be considered a deadly weapon.¹⁶ The court then pointed to the pathologist’s testimony that the blows to the victim’s head caused by the thrusts against the dormitory wall were consistent with injuries generally caused by a heavy object. The pathologist further testified that the strangulation caused her larynx and thyroid gland to hemorrhage. Clearly, the court reasoned, had Davis used an inanimate object, rather than his hands or fists, a jury charge regarding the use of a deadly weapon would have been appropriate. The court found no reason to distinguish between injuries caused by an instrumentality, such as a hammer or baseball bat, and hands or fists that inflicted similar injuries.¹⁷ The court then cited the cases from neighboring jurisdictions that the trial judge relied upon for the proposition that the jury should decide whether a hand or fist constitutes a deadly weapon or object in a given case.¹⁸

The court’s reliance on *Hariott*, however, is misplaced. In *Hariott* the court found that “[t]he evidence presented a close case as to whether appellants were guilty of assault and battery of a high and aggravated nature or simple

13. Specifically, the trial judge charged the jury as follows:

What is a dangerous, or deadly, object? That is a factual matter that the jury must decide, or determine. You must answer that question factually based on this evidentiary record before you. Under the law of the State of South Carolina, the hand, or fist, of a person is not normally considered a dangerous, or deadly, object, but under some circumstances, a hand, or fist, of a person may be used in such a fashion, or in such a manner, as to constitute a dangerous, or deadly object. It is for you, the jury, to determine and decide in this case beyond a reasonable doubt whether, or not, a hand, or fist, constitutes a dangerous, or deadly, object.

Id. at ___, 422 S.E.2d at 144 (footnote omitted).

14. 210 S.C. 290, 42 S.E.2d 385 (1947).

15. *Id.* at 299-300, 42 S.E.2d at 389 (citing *Wilson v. State*, 258 S.W. 972 (Ark. 1924)).

16. *Davis*, ___ S.C. at ___, 422 S.E.2d at 144.

17. *Id.* at ___, 422 S.E.2d at 144.

18. *Id.* at ___, 422 S.E.2d at 144; see *Quarles v. Georgia*, 204 S.E.2d 467, 468-69 (Ga. Ct. App. 1974) (recognizing that although fists are not deadly weapons *per se*, the jury may determine that fists are deadly weapons, depending on the manner and means of their use); *State v. Grumbles*, 411 S.E.2d 407, 409 (N.C. Ct. App. 1991) (“[D]efendant’s fists could have been deadly weapons given the manner in which they were used and the relative size and condition of the parties.”) (citing N.C. GEN. STAT. § 14-32 (1986)).

assault and battery, or not guilty.”¹⁹ In *Davis* the state argued that when the *Hariott* court remanded the case and allowed consideration of assault and battery of a high and aggravated nature, it implicitly found that hands and fists could cause assault and battery of a high and aggravated nature.²⁰ However, this argument contains serious flaws.

The *Hariott* court expressly stated that “[t]he evidence was tenuous, but doubtless sufficient, by reason of the state’s evidence as to disparity in the number engaged on each side, to take the case to the jury.”²¹ The court recognized that many other reasons exist (besides that the fists and hands of the assailants may have been deadly weapons) which justify remanding the case for reconsideration of the defendant’s guilt of the higher offense.

Furthermore, a review of the case relied on by the *Hariott* court, *Wilson v. State*,²² demonstrates that the *Davis* court misinterpreted *Hariott*. The *Wilson* court stated: “A powerful man . . . might kill one by striking with the fist or kicking with the foot; but a great bodily injury by this means would not be an assault with a deadly weapon, instrument, or other thing, in the sense of the aggravated assault statute.”²³ Reliance on *Wilson* supports the contention that the *Hariott* court did not intend to consider hands or fists as deadly weapons. Interestingly, other jurisdictions have cited *Hariott* as support for the proposition that parts of the human body may not be regarded as deadly weapons.²⁴

Assuming *arguendo* that *Davis* justifiably relied on *Hariott*, the court’s ruling effectively opened the door for consideration of other body parts²⁵ as deadly weapons. Thus, South Carolina adopted the minority rule in *Davis* that

19. *Hariott*, 210 S.C. at 300, 42 S.E.2d at 389.

20. Brief of Respondent at 56-57.

21. *Hariott*, 210 S.C. at 299, 42 S.E.2d at 389 (emphasis added). The court added: “‘Assault and battery of a high and aggravated nature,’ is an unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation, such as the use of a deadly weapon, the infliction of serious bodily injury, the intent to commit a felony, the great disparity between the ages and physical conditions of the parties, a difference in the sexes, indecent liberties or familiarities with a female, the purposeful infliction of shame and disgrace, resistance of lawful authority, and others.”

Id. (quoting *State v. Jones*, 133 S.C. 167, 181, 130 S.E. 747, 751 (1925)).

22. 258 S.W. 972 (Ark. 1924).

23. *Id.* at 972-73.

24. See *Commonwealth v. Davis*, 406 N.E.2d 417, 420 (Mass. App. Ct. 1980) (teeth and other body parts); *People v. Van Diver*, 263 N.W.2d 370, 372 (Mich. Ct. App. 1977) (bare hands).

25. There is growing interest in the possibility of teeth being considered deadly weapons when the “biter” is HIV-positive. See Jerry V. McMartin, *HIV Infection in the Prison Environment: Medical Treatment; Teeth as Weapons; and HIV Infection as a Cause for Leniency*, Aug. 1990, available in WESTLAW, 1990 WL 357777; Donald H.J. Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 ST. LOUIS U. PUB. L. REV. 351 (1990).

allows the jury to decide on a case-by-case basis whether a body part (currently limited to a hand or fist) can be a dangerous weapon.²⁶

A strong case, however, can be made that to consider hands and fists as deadly weapons conflicts with South Carolina's statutes and public policy. The statutory language does not indicate that the South Carolina Legislature ever considered body parts as deadly weapons. In fact, the *Davis* court acknowledged that the South Carolina legislature only recognized instruments designed for infliction of personal injury as deadly weapons.²⁷ Because penal statutes should be construed against the State,²⁸ the *Davis* holding is questionable in light of these statutes.

The court also pointed to the common law under which ordinary objects may become deadly weapons when used to inflict serious physical injury or death.²⁹ However, all the objects cited are inanimate devices. Furthermore, crimes involving deadly weapons are treated harshly because possession of a dangerous weapon increases the likelihood of conflict, violence, and serious injury or death.³⁰ The court frustrates this common-law principle if hands or fists, which are obviously always in possession of a defendant, may be considered deadly weapons.

Considering the violent facts of *Davis*, it is understandable that the court permitted the jury to consider hands and fists as deadly weapons. In *Davis* the defendant actually used his hands and fists to murder the victim.³¹ Unfortu-

26. See *Arizona v. Gordon*, 778 P.2d 1204, 1206 (Ariz. 1989) (listing states in the minority but declining to join); Vitauts M. Gulbis, Annotation, *Parts of the Human Body, Other than Feet, as Deadly or Dangerous Weapons for Purposes of Statutes Aggravating Offenses such as Assault and Robbery*, 8 A.L.R. 4TH 1268 (1981) (discussing cases which address the issue).

27. Section 16-3-625 states that "'deadly weapon' shall mean a shotgun, rifle, pistol or knife." S.C. CODE ANN. § 16-3-625 (Law. Co-op. 1985). Numerous other statutes refer to various instruments or weapons as "deadly weapons," and therefore support the contention that the legislature meant to limit deadly weapons to instruments. Section 16-3-410 refers to "sword, pistol, rapier or any other deadly weapon." S.C. CODE ANN. § 16-3-410 (Law. Co-op. 1985). Section 16-11-311 partially defines a burglar as one "armed with a deadly weapon or explosive." S.C. CODE ANN. § 16-11-311(A)(1)(a) (Law. Co-op. Supp. 1992). Also, "[a]ny person carrying a dirk, slingshot, metal knuckles, razor, or other deadly weapon usually used for the infliction of personal injury concealed about his person is guilty of a misdemeanor." S.C. CODE ANN. § 16-23-460 (Law. Co-op. 1985 & Supp. 1992). Finally, § 24-13-440 makes it "unlawful for any inmate . . . to carry on his person a dirk, slingshot, metal knuckles, razor, firearm, or any other deadly weapon, homemade or otherwise, which is usually used for the infliction of personal injury upon another person." S.C. CODE ANN. § 24-13-440 (Law. Co-op. 1989).

28. E.g., *State v. Cutler*, 274 S.C. 376, 264 S.E.2d 420 (1980) (per curiam).

29. See *State v. Johnson*, 187 S.C. 439, 198 S.E. 1 (1938) (hoe); *State v. Smalls*, 17 S.C. 62 (1882) (barrel-stave); *State v. Beadon*, 17 S.C. 55 (1882) (shovel).

30. See, e.g., *Commonwealth v. Davis*, 406 N.E.2d 417, 422 (Mass. App. Ct. 1980). See generally Walter E. Oberer, *The Deadly Weapon Doctrine—Common Law Origin*, 75 HARV. L. REV. 1565, 1573-76 (1962).

31. Did the defendant's hands and fists murder the victim, or was it the thrusts against the

nately, however, the court may not have considered the possible, and perhaps inevitable, ramifications of its decision.

The majority of jurisdictions have determined that under no circumstances should body parts be considered deadly weapons.³² The Idaho Supreme Court reasoned that

[i]f one's hands can be considered a deadly weapon, every battery involving the use of one's hands could be charged, prosecuted and submitted to the jury as aggravated battery, and every assault involving the threatened use of one's hands could be charged, prosecuted, and submitted to the jury as aggravated assault. This would blur the statutory distinction between simple misdemeanor assault or battery and aggravated felony assault or battery, and thereby do violence to the legislative intent in providing enhanced punishment for the use of a deadly weapon in the commission of an assault or battery. We therefore conclude that hands, or other body parts or appendages, may not, by themselves, constitute deadly weapons under the aggravated assault and aggravated battery statutes.³³

Florida's state court of appeals agrees, stating the following:

Clearly something more than the use of bare hands is intended by [the Model Penal Code's definition of deadly weapon]. Otherwise, the concept of what constitutes a deadly weapon could become so broad as to be meaningless and unconstitutionally vague. Almost every battery would potentially be an "aggravated battery." That would do violence to our long accepted mandate to construe criminal statutes *strictly*.³⁴

The *Dixon* court recognized that a possible exception might exist in the case of a person specially trained in the martial arts to kill or inflict deadly force with their hands or feet.³⁵ Finally, the Colorado Court of Appeals stated yet

dormitory wall? If her death was caused by severe trauma to the brain, the court should have found the wall was the deadly weapon employed. If, however, the victim died from strangulation (and no cord, rope, or other instrumentality was used), then the defendant's hands were used to commit murder. The actual cause of death appears inconclusive.

32. Gulbis, *supra* note 26 at 1270.

33. State v. Townsend, No. 18866, 1992 WL 535110 at *5 (Idaho Dec. 2, 1992).

34. Dixon v. State, 603 So. 2d 570, 571-72 (Fla. Dist. Ct. App. 1992) (en banc). The Model Penal Code defines deadly weapon as "any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury." MODEL PENAL CODE § 210.0(4) (1980), *quoted in id.* at 571. This definition, which the *Dixon* court found not to include body parts, is even broader than South Carolina's statutory definition.

35. *Dixon*, 603 So. 2d at 572. However, the court expressly reserved this issue for future consideration. *Id.*

another rationale for opposing the classification of body parts as deadly weapons.

Historically, fists have not been considered a deadly weapon. The traditional view is that a deadly weapon is one which is capable of causing death or serious bodily injury because of its design or construction. Under this analytical approach, weapons such as firearms, knives, clubs, and axes constitute deadly weapons as a matter of law.

Also, the inclusion of human body parts, such as fists, within the concept of deadly weapons, presents conceptual problems. The most obvious such problem is that unlike other kinds of weapons, fists are not instrumentalities separate from the person and are not generally considered weapons by a person faced with a possible attack. However, it is undeniable that they may be used to cause death or serious physical injury.³⁶

Many other courts have held that body parts such as fists and teeth cannot be considered deadly weapons under any circumstances as a matter of law.³⁷

In the often-cited *Commonwealth v. Davis*,³⁸ the court addressed the issue from a slightly different perspective. The court attempted to predict the implications of allowing body parts to be considered deadly weapons.

The treatment of parts of the body as potential weapons also opens the door to other idiosyncratic prosecutions under statutes which base aggravation on whether the actor is "armed." We have great respect for the ability of a sensible jury to reject out of hand, on the particular facts, the more fanciful prosecutions which would be possible if unadorned hands, fingers, feet or teeth were to qualify as dangerous weapons. However, we cannot overlook the facts that under the current state of our law the fact finder would have to consider and determine the appropriate-

36. *People v. Ross*, 819 P.2d 507, 508-09 (Colo. Ct. App. 1991), *rev'd*, 831 P.2d 1310 (Colo. 1992) (citations omitted); *see also* Gulbis, *supra* note 24. However, the Colorado Supreme Court rejected the court of appeals' rationale and reversed the decision. *People v. Ross*, 831 P.2d 1310 (Colo. 1992) (en banc). The Colorado Supreme Court noted that the court of appeals failed to recognize that Colorado's statutory definition of "deadly weapon" includes *any* object used in a manner capable of producing death or serious bodily harm. *Id.* at 1313 n.3 (citing COLO. REV. STAT. ANN. § 18-1-901(3)(e) (West 1986)). The court held that fists may be considered deadly weapons under § 18-1-901 (3)(e) if used or intended to be used to cause death or serious bodily injury. *Id.* at 1313.

37. Cases so holding include: *Wilson v. State*, 258 S.W. 972 (Ark. 1924); *People v. Graham*, 455 P.2d 153 (Cal. 1969) (en banc); *People v. Bias*, 475 N.E.2d 253 (Ill. App. Ct. 1985); *State v. Calvin*, 24 So. 2d 467 (La. 1945); *Seiter v. State*, 719 S.W.2d 141 (Mo. Ct. App. 1986); *Bean v. State*, 138 P.2d 563 (Okla. Crim. App. 1943); *State v. Ireland*, 447 P.2d 375 (Utah 1968).

38. 406 N.E.2d 417.

ness of each and every such indictment; that prosecutors would thus be encouraged to bring felony indictments for many situations now handled as misdemeanors, if only for the strategic advantage such indictments would give the Commonwealth; and that there would undoubtedly be many felony convictions for crimes which are now punishable only as misdemeanors.³⁹

The full impact of *State v. Davis* will not be realized for some time. No reason militates against the court expanding its reasoning to include a consideration of teeth,⁴⁰ feet, or other body parts as deadly weapons. We will have to wait and see if solicitors will zealously pursue this new avenue of prosecution, or if they will use it only in the most violent and extreme cases, perhaps limiting its use to murder.

Courtney Crook Richardson

V. COURT FINDS ATTORNEY'S MISTAKE OF LAW THAT INDUCED CLIENT'S GUILTY PLEA TO BE INEFFECTIVE ASSISTANCE OF COUNSEL

In *Murdock v. State*¹ the South Carolina Supreme Court vacated, on the grounds of ineffective assistance of counsel, a defendant's guilty plea that was entered on the advice of her attorney. The court, with its usual terse review of post-conviction relief (PCR) cases, found that the attorney mistakenly advised the defendant to plead guilty to a crime she did not commit.² However, the court's failure to fully articulate some necessary stages of its analysis raises the possibility that the decision may affect future PCR cases.

39. *Id.* at 422 (footnotes omitted).

40. In *Brock v. State* 555 So. 2d 285 (Ala. Crim. App. 1989), the Alabama Court of Criminal Appeals, which recognized that fists may be deadly weapons, rejected the contention that an HIV-positive defendant's teeth and mouth were deadly weapons when he bit a prison guard. The court declined to take judicial notice that biting is a means of transmitting AIDS, *id.* at 287-88, stating: "Although biting is of 'particular concern,' 'evidence for the role of saliva in the transmission of virus is unclear.'" *Id.* at 288 (quoting *Guidelines for Prevention of Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Health-Care and Public-Safety Workers*, (U.S. Dep't of Health & Human Serv.), Feb. 1989, at 9, 15). Consequently, the state did not prove "the defendant used his mouth and teeth under circumstances 'highly capable of causing death or serious physical injury.'" *Id.* at 287 (quoting ALA. CODE § 13A-1-2(12)(1982)). Using this reasoning, the Alabama court may well consider an HIV positive person's sexual organs to be a deadly weapon in a sexual assault case if the court takes judicial notice of the fact that sexual intercourse is a method of transmitting the virus. The AIDS epidemic presents a significant potential for litigation over these issues.

1. ___ S.C. ___, 426 S.E.2d 740 (1992).

2. *Id.* at ___, 426 S.E.2d at 742.

On October 7, 1989, Teresa Murdock was stopped for driving erratically and subsequently arrested for driving under the influence and for driving under suspension (DUS). The arresting officer searched her car and found three bags apparently containing cocaine. The officer also found what appeared to be 81 microdots of LSD. After testing the substances, SLED found that they were not controlled substances.³

Murdock was indicted for DUS, for two counts of possession of a counterfeit substance with intent to distribute, and for another DUS offense that occurred on April 3, 1990. On the advice of her attorney, Murdock pleaded guilty to all the charges and was sentenced to two sixty-day terms for the DUS counts and two five-year terms for the possession counts, all to run concurrently.⁴ Forgoing a direct appeal, she later filed a PCR application claiming (1) that insufficient evidence existed to sentence her for possession of counterfeit drugs with intent to distribute, and (2) that she received ineffective assistance of counsel.⁵ After a hearing, the PCR judge found that (1) the insufficient evidence claim was a direct appeal issue which Murdock waived by failing to make such an appeal; (2) counsel's performance was not ineffective and Murdock was not prejudiced; and (3) Murdock's plea was voluntary and intelligent, thereby waiving all nonjurisdictional defects and defenses, including ineffective assistance of counsel.⁶ The judge thus denied Murdock's PCR application,⁷ and Murdock appealed the decision to the supreme court.⁸

The supreme court subsequently reversed the denial of the defendant's PCR application.⁹ The decision turned on the statutory distinction between an "imitation controlled substance"¹⁰ and a "counterfeit substance."¹¹ The

3. *Id.* at ___, 426 S.E.2d at 741.

4. *Id.* at ___, 426 S.E.2d at 741.

5. Application for Post Conviction Relief at 2.

6. Order of Dismissal at 4-6.

7. *Id.* at 7.

8. *Murdock*, ___ S.C. at ___, 426 S.E.2d at 741.

9. *Id.* at ___, 426 S.E.2d at 741.

10. The South Carolina Code states: "'Imitation controlled substance' means a noncontrolled substance which is represented to be a controlled substance and is packaged in a manner normally used for the distribution or delivery of an illegal controlled substance." S.C. CODE ANN. § 44-53-110 (Law. Co-op. 1985).

11. The South Carolina Code states:

"Counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser.

court held that, although it is illegal in South Carolina to possess a counterfeit substance with the intent to distribute,¹² it is not illegal merely to possess imitation drugs with the intent to distribute; it is only illegal to actually distribute imitation drugs.¹³ Because Murdock possessed imitation drugs, not counterfeit drugs, the court found that she had not committed the crime to which she pleaded guilty.¹⁴

Although Murdock's appeal to the supreme court focused on the knowing and voluntary aspect of her plea,¹⁵ the court seemingly ignored that issue and based its decision on ineffective assistance of counsel grounds.¹⁶ After noting that its review was limited to determining whether any evidence supported the PCR judge's findings,¹⁷ the court held that "[t]o establish a claim of ineffective assistance of counsel, petitioner must show that counsel's performance was deficient and but for this deficiency petitioner would not have pled guilty."¹⁸ The court completed the remainder of its analysis in only three sentences:

Although trial counsel diligently tried to render effective assistance of counsel, he erred in failing to distinguish between counterfeit and imitation offenses. Petitioner testified that she wanted a jury trial, but based upon trial counsel's advice she pled guilty to an offense which she did not commit. Therefore, petitioner was prejudiced by trial counsel's performance.¹⁹

The court then reversed the denial of Murdock's application.²⁰

Although the court neglected to state *why* trial counsel's failure to distinguish between counterfeit and imitation drugs was deficient, its decision was nonetheless correct. According to the United States Supreme Court, "a defendant who pleads guilty upon the advice of counsel 'may only attack the

S.C. CODE ANN. § 44-53-110 (Law. Co-op. 1985).

12. See *Murdock*, ___ S.C. at ___, 426 S.E.2d at 742 (citing S.C. CODE ANN. § 44-53-370(a)(2) (Law. Co-op. 1985)). For amendments to this section, see S.C. CODE ANN. § 44-53-370(a)(2) (Law. Co-op. Supp. 1992).

13. *Id.* at ___, 426 S.E.2d at 742 (citing S.C. CODE ANN. § 44-53-390(a)(6) (Law. Co-op. 1985)).

14. *Id.* at ___, 426 S.E.2d at 742.

15. See Brief of Petitioner at 3.

16. See *Murdock*, ___ S.C. at ___, 426 S.E.2d at 742. For a theory of why the court chose this approach, see *infra* note 21 and accompanying text.

17. *Murdock*, ___ S.C. at ___, 426 S.E.2d at 742 (citing *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989)).

18. *Id.* at ___, 426 S.E.2d at 742 (citing *Hill v. Lockhart*, 474 U.S. 52 (1985) and *Strickland v. Washington*, 466 U.S. 668 (1984)).

19. *Id.* at ___, 426 S.E.2d at 742.

20. *Id.* at ___, 426 S.E.2d at 742.

voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.”²¹ *McMann v. Richardson*²² requires inquiry into “whether [the] advice was within the range of competence demanded of attorneys in criminal cases.”²³ South Carolina courts have since consistently held that attorneys’

21. *Hill*, 474 U.S. at 56-57 (quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). However, *Hill* took the *Tollett* quote out of context and gave it a different meaning. The respondent in *Tollett*, who pleaded guilty to first-degree murder and received a 99-year sentence, was granted habeas corpus relief because of the exclusion of blacks from the grand jury that indicted him. The Supreme Court reversed, stating:

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. *He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann.*

Tollett, 411 U.S. at 267 (emphasis added). The Court did not say that the only way to attack a guilty plea was by showing ineffective assistance of counsel; the Court said that attacking the guilty plea by alleging ineffective assistance of counsel was the only avenue open to this respondent (*i.e.*, If attacking the voluntary and intelligent character of the guilty plea, then the petitioner must show that counsel failed the *McMann* standard. However, other avenues to attack the guilty plea could be available, but not to someone like the prisoner in *Tollett*.).

The *Hill* language, however, may explain why the *Murdock* court seemingly ignored the voluntariness and intelligence issue of *Murdock*’s guilty plea and addressed only the ineffectiveness of counsel issue. But see *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991), for an example of a post-*Hill* case in which the supreme court, without employing an ineffective counsel analysis, found a guilty plea neither voluntarily nor understandingly made.

As the PCR judge noted, in South Carolina a defendant’s voluntary guilty plea waives all nonjurisdictional defects and defenses, including ineffective assistance of counsel. Order of Dismissal at 6 (citing *Whetsell v. State*, 276 S.C. 295, 277 S.E.2d 891 (1981) and *LoPiano v. State*, 270 S.C. 563, 243 S.E.2d 448 (1978)). Thus, a defendant who may attack the voluntariness of a guilty plea only by alleging ineffective assistance of counsel would always be barred from doing so. This assertion may be why the court chose not to address the waiver issue. In the future, however, the court should rectify the problem by expressly excluding effective assistance of counsel from the list of constitutional rights waived by a voluntary guilty plea. *Hill*’s prejudice requirement will provide an adequate safeguard against errors by counsel which do not affect the plea.

22. 397 U.S. 759 (1970).

23. *Id.* at 771, quoted in *Hill*, 474 U.S. at 56. Between *McMann* and *Hill*, the Supreme Court adopted an “objective standard of reasonableness” test for ineffective assistance of criminal claims. *Strickland v. Washington*, 466 U.S. 668 (1984). It added that “[m]ore specific guidelines are not appropriate,” preferring instead to rely on the legal profession to maintain sufficient standards to ensure that its members’ representation satisfies the Sixth Amendment. *Id.* at 688. Such self-policing may not always work though. *Murdock*’s attorney testified that he contacted several defense attorneys in Charleston and Columbia, as well as the attorney general’s office, regarding sentencing for the possession of a counterfeit drug. Tr. of Post Conviction Relief Hr’g. at 37. Apparently none of these attorneys were aware of the difference between counterfeit and imitation drugs or presumably they would have informed *Murdock*’s

errors of law render their performance deficient,²⁴ so the *Murdock* court's finding is not surprising.

The court's holding regarding the prejudice prong of the analysis proves more troublesome. The court stated that a "petitioner must show that . . . but for [counsel's] deficiency [the] petitioner would not have pled guilty."²⁵ The court then found the test satisfied because *Murdock* pleaded guilty to a crime she did not commit.²⁶ Is the court saying that it will find prejudice whenever an innocent defendant pleads guilty? It should not so assert, because such a holding assumes that a reasonable probability will always exist that an innocent defendant will not plead guilty to a crime. That assumption may not always be warranted and may cause problems for prosecutors, particularly in the area of plea bargaining.

When plea bargains are involved, there may well be instances in which a defendant will want to plead guilty to a crime even though innocent. Suppose, for example, that *Murdock* was charged with, and was guilty of, some other crimes in connection with her arrest, but the prosecutors dropped the charges in return for her guilty plea on the counterfeit drug count. In such a case, her guilty plea would be motivated by the favorable plea bargain, even though insufficient evidence existed to convict her on the possession charges. Upon later learning that her guilty plea could be vacated, *Murdock* could wait for the evidence relating to the dropped charges to grow stale (*e.g.*, witnesses

attorney of his error. The supreme court evidently noted this fact and therefore, it used this case to instruct the bar on the distinction between counterfeit and imitation substances.

Apparently, South Carolina adopted the rule that "[a] convict generally must establish that his counsel's error was so flagrant that a court can conclude that it resulted from neglect or ignorance rather than from informed, professional deliberation." *State v. Pendergrass*, 270 S.C. 1, 5, 239 S.E.2d 750, 752 (1977) (quoting *Marzullo v. Maryland*, 561 F.2d 540, 544 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978)). Although the court did not expressly adopt the *Marzullo* rule in *Pendergrass*, it has since relied upon *Marzullo* on a number of occasions. *See, e.g.*, *Stone v. State*, 294 S.C. 286, 288, 363 S.E.2d 903, 904 (1988).

24. *See Gallman v. State*, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (finding failure to object to a per se prejudicial jury instruction an error of law which downgraded attorney's performance below an objective standard of reasonableness); *Hinson v. State*, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989) (finding counsel's misstatement of law, regarding parole eligibility, fell "below the level of competence reasonably expected of attorneys in criminal cases"). These holdings comport with *Marzullo* because the errors of law stem from ignorance rather than from informed, professional judgment.

25. *Murdock*, ___ S.C. at ___, 426 S.E.2d at 742 (citing *Hill v. Lockhart*, 474 U.S. 52 (1985) and *Strickland v. Washington*, 466 U.S. 668 (1984)). Perhaps formulated inadvertently, the *Murdock* court's "but-for" standard appears more stringent than *Hill*'s standard, which requires a showing of only a "reasonable probability" that the defendant would not have pleaded guilty. *See Hill*, 474 U.S. at 59. Because the assertion of a constitutional right poses a federal question, *Hill* should control if the apparent difference ever becomes an issue. *See Douglas v. Alabama*, 380 U.S. 415, 422 (1965).

26. *Murdock*, ___ S.C. at ___, 426 S.E.2d at 742.

could become unavailable) before attacking her plea. If the court would still find prejudice, Murdock could thereby avoid most of the sentence on the counterfeit drug count and stand a much better chance of winning against the previously dropped charges.²⁷ This type of manipulation would be avoided if the court had been clearer in its holding and stated that it found a reasonable probability *on the facts of this particular case*²⁸ that the defendant would not have pleaded guilty.

The court's use of the "any evidence" scope of review also deserves mentioning. Given that narrow scope, the opinion provides no illumination as to why the court discounted the findings of the PCR judge,²⁹ each of which was based on testimony given at the PCR hearing. Had there been no error by the attorney, little question would exist as to the adequacy of his representation. Therefore, it might appear that the court must have ignored its avowed scope of review and found that counsel's error outweighed all the evidence of adequate representation. There are a couple of ways, however, to reconcile the court's finding with its narrow scope of review. *Cherry v. State*,³⁰ which provided that "'any evidence' of *probative value* is sufficient to uphold the PCR judge's findings,"³¹ provides one possible explanation. The court may

27. Of course, one could argue that the possibility of such a scenario would serve as an incentive for prosecutors to make sure that the defendant is actually guilty of the crime(s) as charged.

28. Murdock's attorney testified that the state offered to run the sentences concurrently and drop the charges of obtaining drugs under false pretenses and unlawful possession of prescription drugs in return for Murdock's guilty plea. Tr. of Post Conviction Relief Hr'g at 40-41. Obtaining drugs under false pretenses carries a maximum prison sentence of 18 months for first-time offenders. S.C. CODE ANN. § 44-53-40 (Law. Co-op. 1985). Unlawful possession of prescription drugs carries the same maximum prison sentence. S.C. CODE ANN. §§ 40-43-150, -320 (Law. Co-op. 1986 & Supp. 1992).

29. The PCR judge's order read:

[Murdock's attorney] testified on behalf of the State that he spent many hours of research and investigation in preparation for this case, that he met with Applicant to prepare for her trial and formulated a defense strategy, that he consulted with expert attorneys in the area of criminal law concerning sentencing for possession of counterfeit drugs, that he filed several motions on behalf of Applicant, that he successfully presented a motion which permitted Applicant to be sentenced under § 44-3-390 so that she only was exposed to five (5) years for each possession count rather than fifteen (15) . . . , that he fully discussed the charges and possible sentence with the Applicant, that although his motion for a continuance was denied, he was fully prepared to go forward with the trial and that after a discussion with Applicant that Applicant decided to plead guilty, and that . . . the Applicant expressed her appreciation to him and remarked as to her good luck.

Order of Dismissal at 4-5.

30. 300 S.C. 115, 386 S.E.2d 624 (1989), cited in *Murdock*, ___ S.C. at ___, 426 S.E.2d at 472 as support for the scope of review in PCR appeals.

31. *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626 (emphasis added) (citing *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984)).

have reasoned that the evidence cited by the PCR judge lacked any probative value. A better analysis, however, would have characterized counsel's error as an error in advising Murdock of the elements of the crime with which she was charged, and not as an error in advising her to plead guilty. The court then could have found that the error was based on ignorance rather than professional deliberation, thus satisfying *Pendergrass*, and that the error prejudiced Murdock, thus satisfying *Hill* and *Strickland*. Without clearer guidance from the court, when challenging guilty pleas based on the advice of counsel, practitioners should allege specific acts of counsel stemming from ignorance or neglect to which the court can apply a narrow standard of review.

The issues raised by *Murdock* could have been avoided if South Carolina had a rule similar to Rule 11(f) of the Federal Rules of Criminal Procedure.³² As it is, *Murdock* should have been an unremarkable PCR case. The brevity of the court's analysis, though, raises some questions which the court should answer when the opportunity arises. First, did the court hold that an innocent defendant who pleads guilty is always prejudiced? Second, did the court abandon its "any evidence" standard of review for PCR cases? *Murdock* thus represents yet another instance in which the South Carolina Supreme Court has, to borrow a phrase, "cross[ed] the line from the tolerably terse to the intolerably mute."³³

James C. Siokos

VI. SELF-DEFENSE AND THE BATTERED WOMAN'S SYNDROME

In *Robinson v. State*¹ the South Carolina Supreme Court outlined the compatibility of the battered woman's syndrome with the law of self-defense while denying a prisoner's petition for post-conviction relief. The petitioner was convicted of murdering her husband and claimed ineffective assistance of counsel because her attorney failed to present evidence of the battered woman's syndrome.² The court held that counsel's failure to use this

32. Rule 11(f) states: "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." FED. R. CRIM. P. 11(f). The advisory committee wrote that "[t]he normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty." FED. R. CRIM. P. 11 advisory committee's note to 1966 Amendment.

33. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

1. ___ S.C. ___, 417 S.E.2d 88 (1992).

2. *Id.* at ___, 417 S.E.2d at 90.

evidence to establish a claim of self-defense was not ineffective assistance because the petitioner's trial occurred six years before the South Carolina Supreme Court recognized the battered woman's syndrome.³ Significantly, however, the court "provide[d] some guidance to members of the bench and bar" by addressing the relationship between the battered woman's syndrome and self-defense.⁴

On December 22, 1979, Bertha M. Robinson shot her husband in the head with a .22 caliber pistol while he slept. A jury convicted her of murder, and she was sentenced to life imprisonment.⁵ The supreme court affirmed her conviction, and in 1989 she petitioned for post-conviction relief claiming ineffective counsel.⁶ Robinson alleged that she received deficient representation because her trial counsel failed to present the battered woman's syndrome as proof that she acted in self-defense when she killed her husband. Although Robinson's counsel introduced evidence of her abuse in an attempt to mitigate the crime, her attorney "did not attempt to instruct the jury regarding the psychological effects of the battered woman's syndrome."⁷

The Sixth Amendment grants criminal defendants the right to assistance of counsel.⁸ In South Carolina, a person convicted of a crime who claims this right was abridged may petition for post-conviction relief.⁹ In this case, the court ruled that under the standards set forth in *Strickland v. Washington*,¹⁰ Robinson failed to demonstrate her trial counsel's ineffectiveness.¹¹ Consequently, the supreme court denied Robinson's petition "finding that trial counsel's performance was within the range of competence demanded of attorneys in criminal matters."¹² The court refused to hold the defense

3. *Id.* at ___, 417 S.E.2d at 90.

4. *Id.* at ___, 417 S.E.2d at 91.

5. *Id.* at ___, 417 S.E.2d at 89.

6. ___ S.C. at ___, 417 S.E.2d at 89.

7. *Id.* at ___, 417 S.E.2d at 89.

8. U.S. CONST. amend. VI.

9. S.C. CODE ANN. §§ 17-27-10 to -120 (Law. Co-op. 1985). Other grounds for post-conviction relief include claims that the court lacked jurisdiction, that the sentence exceeds the maximum allowed by law, that newly discovered evidence exists, that the convict is unlawfully held in custody, and that the conviction is subject to collateral attack based on alleged error under statutory or common law. *Id.* § 17-27-20(a).

10. 466 U.S. 668 (1984).

11. *Robinson*, ___ S.C. at ___, 417 S.E.2d at 90-91. To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient [and] . . . that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. To show that counsel's performance was deficient, the "petitioner must show that her trial counsel's performance was not reasonable under prevailing professional norms." *Robinson*, ___ S.C. at ___, 417 S.E.2d at 90 (citing *Strickland*, 466 U.S. at 688). To demonstrate prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

12. *Robinson*, ___ S.C. at ___, 417 S.E.2d at 91.

counsel's representation "ineffective for failing to present evidence of a complex psychological phenomenon which had not yet been recognized by this Court, and which only recently had been identified by the scientific community."¹³

However, the most significant aspect of the court's opinion lies in its discussion of the battered woman's syndrome and its place in South Carolina's self-defense jurisprudence. The battered woman's syndrome emerged only recently in the psychological community, and attorneys must gain a basic understanding of it before employing it as a self-defense allegation.

Dr. Lenore E. Walker, a frequent expert witness on the subject, conducted some of the first systematic research on the battered woman's syndrome.¹⁴ From this research, Dr. Walker defined the battered woman as follows:

A woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. . . . [T]o be classified as a battered woman, the couple must go through the battering cycle at least twice.¹⁵

Dr. Walker attempted to dispel the many myths and stereotypes of the battered woman and her abuser.¹⁶ Her interviews allowed her to discern many common characteristics of both groups that help identify a battered woman or an abusive man.¹⁷ Dr. Walker's explanation of the battered woman's syndrome continues with a description of the "learned helplessness" theory.¹⁸ This theory aids in understanding why abused women refuse to leave the battering relationship. An application of the research performed by Martin Seligman to the responses of battered women helps explain why these women act as they do. Seligman's experiments exposed dogs to electrical shocks. Once the animals realized that no response they made would cease the shocks, they "became compliant, passive, and submissive" and eventually stopped attempting to escape altogether.¹⁹

13. *Id.* at ___, 417 S.E.2d at 90-91 (footnote omitted); see also *Strickland*, 466 U.S. at 680 (finding "counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight").

14. See LENORE E. WALKER, *THE BATTERED WOMAN* (1979); LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* (1989).

15. WALKER, *THE BATTERED WOMAN*, *supra* note 14, at xv. For a description of the battering cycle, see *infra* text accompanying notes 21-29.

16. WALKER, *THE BATTERED WOMAN*, *supra* note 14, at 18-31.

17. *Id.* at 31-41.

18. *Id.* at 42-54.

19. *Id.* at 46 (detailing the methods and procedures of Seligman's research and experiments).

Psychologists believe this same learned helplessness phenomenon develops in battered women. Dr. Walker further elucidates this theory:

Thus, in applying the learned helplessness concept to battered women, the process of how the battered woman becomes victimized grows clearer. Repeated batterings, like electrical shocks, diminish the woman's motivation to respond. She becomes passive. . . . She does not believe her response will result in a favorable outcome, whether or not it might.²⁰

These recurring beatings engender a belief in these women that nothing they do will solve their dilemma; and therefore, they lose their ability to respond effectively.

A clearer understanding of how this learned helplessness becomes indoctrinated into abused women requires an explanation of the cyclical nature of battering relationships. Dr. Walker outlined three phases in the battering cycle "which vary in both time and intensity for the same couple and between different couples."²¹ The first phase, called tension-building, involves relatively minor beatings, such as slapping, verbal abuse, and psychological trauma.²² During this phase most women simply endure this comparatively minor abuse and placate the batterer hoping to prevent more serious beatings.²³

Unfortunately, the tension during this phase inevitably escalates into the acute battering phase "characterized by the uncontrollable discharge of the tensions that have built up during phase one."²⁴ The most serious battering incidents occur during this second phase. The woman no longer attempts any control over the abuser's beatings, realizing that she is powerless and that she cannot reason with him.²⁵ Here, the abused woman is most "likely to feel . . . a sense of being psychologically trapped."²⁶

When this acute battering period ends, the final phase begins. Typical characteristics of this phase include the batterer's "loving, kind, and contrite behavior [T]he batterer constantly behaves in a charming and loving manner He begs her forgiveness and promises her that he will never do it again."²⁷ The woman convinces herself that he will change, and "[i]t is in this phase of loving contrition that the battered woman is most thoroughly

20. *Id.* at 49-50.

21. WALKER, THE BATTERED WOMAN, *supra* note 14, at 55.

22. WALKER, TERRIFYING LOVE, *supra* note 14, at 42.

23. *Id.* at 42-43; *see also* WALKER, THE BATTERED WOMAN, *supra* note 14, at 56-59.

24. WALKER, THE BATTERED WOMAN, *supra* note 14, at 59.

25. WALKER, TERRIFYING LOVE, *supra* note 14, at 44.

26. *Id.*

27. WALKER, THE BATTERED WOMAN, *supra* note 14, at 65.

victimized psychologically. Now the illusion of absolute interdependency is firmly solidified in the woman's psyche, for [now they] really are emotionally dependent on one another—she for his caring behavior, he for her forgiveness.”²⁸

As the relationship revolves through the different cycles, the woman soon realizes that she maintains little or no control over the man's behavior. This realization leads to overwhelming feelings of helplessness and notions that she cannot escape. Meanwhile, the continuous cycle only serves to perpetuate these feelings.²⁹

South Carolina first recognized the battered woman's syndrome as relevant to a claim of self-defense in *State v. Hill*.³⁰ In *Robinson v. State* the supreme court “addressed the relationship between the battered woman's syndrome and the law of self-defense as it is defined in South Carolina.”³¹ The supreme court enumerated the four elements of self-defense in *State v. Davis*.³² In *Robinson* the supreme court held that “the unique perceptions of a defendant suffering from battered woman's syndrome are generally compatible with the law of this State regarding self-defense.”³³

Some elements of self-defense, particularly the “imminence” requirement, appear difficult to satisfy, especially if the battered woman kills her abusive mate when no actual violence is occurring. However, the *Robinson* court provided guidance for addressing each element by focusing on the subjective feelings and beliefs of the battered woman.³⁴ By characterizing the woman

28. WALKER, TERRIFYING LOVE, *supra* note 14, at 45.

29. *Id.* at 43.

30. 287 S.C. 398, 339 S.E.2d 121 (1986). The *Hill* court explicitly refused to recognize “the battered woman's syndrome as a separate defense.” *Id.* at 400, 339 S.E.2d at 122. For a discussion of the battered woman's syndrome in South Carolina law, see WILLIAM S. MCANINCH & W. GASTON FAIREY, *THE CRIMINAL LAW OF SOUTH CAROLINA* 502-04 (2d ed. 1989).

31. ___ S.C. ___, ___, 417 S.E.2d 88, 91 (1992).

32. 282 S.C. 45, 317 S.E.2d 452 (1984) (per curiam).

First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

Id. at 46, 317 S.E.2d at 453, *quoted in Robinson*, ___ S.C. at ___, 417 S.E.2d at 91.

33. *Robinson*, ___ S.C. at ___, 417 S.E.2d at 91.

34. *See id.* at ___, 417 S.E.2d at 91-92.

"as the victim of a continuing assault," she may satisfy the elements of self-defense even though she acted at a time when her abuser was not physically abusing her.³⁵ This rationale fulfills the "imminence" requirement, the second element, "because battered women can experience a heightened sense of imminent danger arising from the perpetual terror of physical and mental abuse. Often the terror does not wane, even when the batterer is absent or asleep."³⁶ Therefore, the *Robinson* court reconciled employing a self-defense claim in the absence of any immediate use of force by the victim.

Although society cannot overlook or ignore the horrible plight of these women,³⁷ the *Robinson* decision, in effect, could excuse or condone murder in situations that fail to meet the literal definition of self-defense. Many women kill their abusers during confrontations in which the women sense a serious change in their demeanor, anticipating that the men actually intend to kill them.³⁸ However, other abused women kill when their abusers neither attack nor provoke them, as in *Robinson*.³⁹ Courts must distinguish between justified killings and killings not in self-defense.

The issue sparked by the battered woman's syndrome no longer remains one of admissibility.⁴⁰ The controversy now appears to revolve around the issue of asserting the battered woman's syndrome in contexts that do not support a literal claim of self-defense.⁴¹ Although the South Carolina Supreme Court reasoned otherwise, some women suffering from the battered woman's syndrome will encounter difficulty in applying the law of self-defense to the facts of their individual case. For example, women who kill their abusers during nonviolent or peaceful episodes create the most difficult

35. *Id.* at ___, 417 S.E.2d at 91.

36. *Id.* at ___, 417 S.E.2d at 91 (citing *State v. Norman*, 378 S.E.2d 8, 16 (N.C. 1989) (Martin, J., dissenting)).

37. For detailed accounts of abuse from actual battered women, see ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* (1987); R. EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* (1979); CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW* (1989); WALKER, *THE BATTERED WOMAN*, *supra* note 14. Also, for an amazing recount of psychological abuse rivaling any Hollywood blockbuster, see *Commonwealth v. Stonehouse*, 555 A.2d 772 (Pa. 1989).

38. See BROWNE, *supra* note 37, at 135 ("Women who had observed the patterns of these men's violence for years now judged the abusers as beyond the point where they would be able to stop short of murder.").

39. Mrs. Robinson shot her husband while he slept. *Robinson*, ___ S.C. at ___, 417 S.E.2d at 89.

40. Most states admit expert testimony on the battered woman's syndrome. For a list of these states and situations in which courts allow such testimony, see *In re Glenn G.*, 587 N.Y.S.2d 464, 470 n.5 (N.Y. Fam. Ct. 1992). At least one state still prohibits this testimony. See *State v. Edwards*, 420 So. 2d 663 (La. 1982) (ruling the expert testimony inadmissible because the defendant did not plead not guilty by reason of insanity).

41. See generally Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991).

scenario for a successful claim of self-defense. This article focuses on this type of situation to raise some potential problems with the *Robinson* court's logic.

Each element of self-defense requires individual consideration to demonstrate that not all killings by battered women are legally justified. The first element of self-defense requires that "the defendant . . . be without fault in bringing on the difficulty."⁴² Most often the man clearly attacks; and consequently, the woman defends. However, in some instances the woman will actually provoke her abuser in an attempt to alleviate the tension which builds during phase one of the cycle. Knowing the inevitability of the beating, she decides (perhaps unconsciously) to "get it over with."⁴³ If she inflicts the fatal wounds during this battle, the *Robinson* court would justify the woman's actions by characterizing her "as the victim of a continuing assault."⁴⁴ Although possibly true, she is not entirely blameless. This reasoning would also hold true when a woman kills her abuser during a respite from the beatings. Although the woman may be faultless in causing the relationship's deep-seated, underlying problems, provoking a confrontation knowing that self-defense could prove fatal or acting at a time of peace obliterates the element of faultlessness.

The second element of self-defense requires that "the defendant must have actually believed [s]he was in imminent danger of losing [her] life or sustaining serious bodily injury, or [s]he actually was in such imminent danger."⁴⁵ Obviously, a severe beating invokes a woman's right to defend herself with appropriate force because she faces actual imminent danger. Possibly, if the abuser threatens death upon a specified contingency, the defendant could encounter imminent danger upon its occurrence, and therefore, could be justified in killing even absent the presence of immediate violence.

However, accepting the court's reasoning that "imminent danger [can] aris[e] from the perpetual terror of physical and mental abuse,"⁴⁶ a battered woman could lawfully kill her abuser, even absent current battering, simply because he is an abuser. Understandably, the likelihood of impending abuse would frighten her, and the learned helplessness theory explains why she does not leave. However, if an abuser manifests no actual intention to kill or inflict serious bodily injury at that moment, killing is neither necessary nor justified because the woman held no actual belief that she faced imminent danger at that time.⁴⁷

42. *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (per curiam).

43. WALKER, TERRIFYING LOVE, *supra* note 14, at 43.

44. *Robinson v. State*, ___ S.C. ___, ___, 417 S.E.2d 88, 91 (1992).

45. *Davis*, 282 S.C. at 46, 317 S.E.2d at 453.

46. *Robinson*, ___ S.C. at ___, 417 S.E.2d at 91.

47. See *State v. McIntosh*, 40 S.C. 349, 361, 18 S.E. 1033, 1039 (1894) (holding that taking

The defendant's *belief* of imminent danger, rather than its actual presence, satisfies the third element of self-defense if "a reasonably prudent [person] of ordinary firmness and courage would have entertained the same belief."⁴⁸ The *Robinson* court responded by stating that "[w]here torture appears interminable and escape impossible, the belief that only the death of the batterer can provide relief may be reasonable in the mind of a person of ordinary firmness."⁴⁹ This statement becomes problematic when one realizes that the reasonable person would not find escape impossible. Only the person suffering from the battered woman's syndrome believes that no chance to leave exists. The language of this element implies that self-defense requires proof that an objective, reasonable person would act the same, not that a battered woman reasonably believed escape impossible. The court's statement implicitly changes the focus from a reasonable person standard to a reasonable battered woman standard.⁵⁰

Although the battered woman's syndrome helps explain why a battered woman considers her actions reasonable, it does not suggest that a reasonably prudent person would respond the same way. If these women's actions were in fact reasonable, then no need would exist for a syndrome to explain them. The very unreasonableness of their reactions makes this phenomenon so baffling. If a battered woman kills based on her subjective belief of imminent harm, the killing may not appear reasonable to a prudent person of ordinary firmness if no battering occurred at that time and the opportunity to leave instead of kill remained an option.⁵¹

To satisfy the fourth element of self-defense, the defendant must show she "had no other probable means of avoiding the danger of losing [her] own life or sustaining serious bodily injury than to act as [s]he did in this particular instance."⁵² No duty to retreat applies when the defendant stands on her own premises,⁵³ and therefore, this issue will not even arise in most cases. In

another's life must be necessary to protect her own life).

48. *Davis*, 282 S.C. at 46, 317 S.E.2d at 453.

49. *Robinson*, ___ S.C. at ___, 417 S.E.2d at 91 (citing *State v. Norman*, 378 S.E.2d 8, 18 (N.C. 1989) (Martin, J., dissenting)).

50. Courts have considered other individual characteristics to determine the reasonableness of the force used. See, e.g., *State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978) (considering age); MCANINCH, *supra* note 30, at 502 ("In determining whether the defendant's belief in the apparent danger and in the necessity of his action meets the objective standard, we should consider a hypothetical person of ordinary firmness but one who shares some of the physical characteristics of the defendant, at least, age, general physical condition and sex in contrast to those physical characteristics of the aggressor.").

51. "[T]he defendant's subjective belief of imminent danger must be reasonable." *State v. Lee*, 293 S.C. 536, 537, 362 S.E.2d 24, 25-26 (1987) (citing *Davis*, 282 S.C. 45, 317 S.E.2d 452).

52. *Davis*, 282 S.C. at 46, 317 S.E.2d at 453.

53. *Id.*

discussing this element, the *Robinson* court stated that “[a] battered woman who is held hostage by her batterer may have no other means of avoiding a battering than to kill her batterer in self-defense.”⁵⁴ Again, the court shifted its emphasis to the subjective impressions of the battered woman. Often, believing that she is held hostage is only in her own mind. Unless amid an attack, the woman could avoid the next inevitable assault by leaving the situation or relationship. The theory of learned helplessness explains why she does not leave, but no theory can erase the fact that escape remains a “probable means of avoiding the danger.”⁵⁵ Thus, a woman’s subjective belief cannot negate the objective reality which provides the standard for this element of self-defense.

In *Robinson* the South Carolina Supreme Court discussed the relevance of the battered woman’s syndrome to a claim of self-defense and found that a battered woman’s perceptions are compatible with this defense.⁵⁶ The court substituted the battered women’s subjective beliefs and feelings for the objective standard embodied in the law of self-defense. Perhaps the court intended to create a “reasonable battered woman” standard based on the theories of learned helplessness and the battered woman’s syndrome. If so, then applying a claim of self-defense may not prove problematic when the killing occurs unaccompanied by violence. Expert testimony can show how a woman can meet the reasonable battered woman standard. However, this controversy will undoubtedly spark much debate and litigation before this area of the law solidifies.

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54. *Robinson v. State*, ___ S.C. ___, ___, 417 S.E.2d 89, 92 (1992).

55. *Davis*, 282 S.C. at 46, 317 S.E.2d at 453.

56. *Robinson*, ___ S.C. at ___, 417 S.E.2d at 91.